

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

## **ELIZABETH CITY STATE UNIVERSITY Family and Medical Leave Policy**

### **Preamble**

The Family and Medical Leave Act (FMLA) of 1993 was passed by Congress to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity; to minimize the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons; and to promote the goal of equal employment opportunity for women and men.

This Act provides reasonable unpaid (1) Family and medical leave for the birth of a child and to care for the newborn child; for the placement of a child with the employee for adoption or foster care; for the care of a child, spouse or parent who has a serious health condition; for the employee's own serious health condition; (2) Qualifying Exigency Leave for families of covered members and (3) Military Caregiver Leave (also known as Covered Service member Leave).

Elizabeth City State University (ECSU) has established a policy for FMLA to be granted for employees. To the extent that any provisions of this policy conflicts with the Office of State Human Resources (OSHR) policy FMLA Section 5, Pages 11-27 of the OSHR version shall control.

### **1. Definitions of Terms**

Under this policy, the following terms are defined accordingly:

#### **A. Parent**

A Parent is defined as a biological or adoptive parent or an individual who stood in loco parentis (a person who is in the position or place of a parent) to an employee when the employee was a child.

#### **B. Child**

A Child is defined as a son or daughter who is under 18 years of age, or is 18 years of age or older and incapable of self-care because of a mental or physical disability, and who is a biological child, an adopted child, a foster child (a child for whom the employee performs the duties of a parent as if it were the employee's child), a step-child (a child of the employee's spouse from a former marriage), a legal ward (a minor child placed by the court under the care of a guardian), or a child of an employee standing in loco parentis.

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

**C. Spouse**

A Spouse is defined as a husband or wife recognized by the State of North Carolina.

**D. Veteran**

The term “veteran” means a person who served in the active military, naval, or air service, and who was discharged or released there from under conditions other than dishonorable.

**E. Covered Active Duty**

The term “covered active duty” means:

1. in the case of an employee who is a regular component of the Armed Forces, duty during the deployment of the employee with the Armed Forces to a foreign country; and
2. in the case of an employee of a reserve component of the Armed forces, duty during the deployment of the member with the Armed Forces to a foreign country under a call or order to active duty under a contingency operation.

**F. Covered Service Member for Military Caregiver Leave**

A covered service member is defined as 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.

**G. Covered Service Member for Exigency Leave**

A covered service member for exigency leave is defined as an employee’s spouse, son, daughter, or parent who is a member of the National Guard or Reserves who is on active duty or has been called to active duty in support of a contingency operation.

**H. Contingency Operation**

The term “contingency operation” means a military operation that:

1. is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or
2. results in the call or order to, or retention on, active duty of service members during a war or during a national emergency declared by the President or Congress.

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

#### **I. Service Member's Next of Kin**

Service Member's next of kin is defined as the nearest blood relative of the service member, other than spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the service member by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered service member has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave, in which case the designated individual shall be deemed to be the next of kin.

To confirm that the employee and service member share one of the familial relationships or to confirm that the employee has been specifically designated as the service member's next of kin, the ECSU may request a statement from the service member outlining the familial relationship or indicating that the employee has been designated as the "next of kin."

#### **J. Serious Health Condition**

Serious Health Condition is defined as an illness, injury, impairment, or physical or mental condition that involves:

1. inpatient care (i.e. an overnight stay) in a hospital, hospice or residential medical facility, including any period of incapacity (defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment for or recovery from), or any subsequent treatment in connection with such impairment; or
2. continuing treatment by a health care provider involving one or more of the following:
  - a. a period of incapacity as defined above of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also involves:
  - b. any period of incapacity due to pregnancy or for prenatal care, even when the employee or family member does not receive treatment from a health care provider during the absence and even if the absence does not last more than three days (prenatal examinations, severe morning sickness)
  - c. any period of incapacity or treatment due to a "chronic serious health condition," even when the employee or family member does not receive treatment from a health care provider during the absence and even if the absence does not last more than three days, which is defined as one:

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

- i. treatment two or more times (within 30 days of the beginning of the period of incapacity and the first visit must take place within seven days of the first day of incapacity) by a health care provider, by a nurse or physician's assistant under the direct supervision of a health care provider, or a provider of health care services (e.g., physical therapist) under orders of, or on referral by a health care provider, or
  - ii. treatment on a least one occasion resulting in a regime of continuing treatment (the first visit must take place within seven days of the first day of incapacity) under the supervision of the health care provider (course of prescription medication, i.e., antibiotic, or therapy requiring special equipment to alleviate the health condition, i.e., oxygen)
  - iii. requiring periodic visits (at least two visits per year) for treatment by a health care provider, or by a nurse or physician's assistant under the direct supervision of a health care provider,
  - iv. continuing over an extended period of time (including recurring episodes of a single underlying condition), and
  - v. which may cause episodic rather than continuing periods(s) of incapacity (e.g., asthma, diabetes, epilepsy, etc.)
- d. incapacity for a permanent or long-term condition for which treatment may not be effective (Alzheimer's, a severe stroke or terminal stages of a disease)
- e. multiple treatments for restorative surgery or incapacity for serious conditions that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment (chemotherapy, radiation, dialysis, etc.)
- f. in case a member of the Uniformed Services, "serious injury or illness" means an injury or illness incurred by the member in line of duty on active duty in the Uniformed Services that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating.
- g. in the case of a veteran who was a member of the Armed Forces (including a member of the National Guard or reserves) at any time during a period of 5 years preceding the date on which the veteran undergoes that medical treatment,

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

recuperation or therapy, “serious injury or illness” means a qualifying (to be defined by the Secretary of Labor) injury or illness that was incurred by the member in 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 line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran.

- h. Treatment includes, but is not limited to, examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. Ordinarily, unless complications arise, the following are examples of conditions that do not meet the definition: common cold, flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, cosmetic treatments, etc. The following may meet the definition if all other conditions of this section are met: restorative dental or plastic surgery after an injury or removal of cancerous growths, mental illness resulting from stress or allergies, treatment from substance abuse.

#### **K. Outpatient Status of Covered Service Member**

“Outpatient status,” with respect to a covered service member, means the status of a member of the Uniformed Services assigned to a military medical treatment facility as an outpatient or a unit established for the purpose of providing command and control of the Uniformed Services receiving medical care as outpatients.

#### **L. Qualifying Exigency**

The reasons for which an employee may take leave because of a qualifying exigency are divided into seven general categories. (1) Short-notice deployment, (2) Military events and related activities, (3) Childcare and school activities, (4) Financial and legal arrangements, (5) Counseling, (6) Rest and recuperation, (7) Post-deployment activities and (8) Additional activities. **For an expanded definition of these reasons, see the paragraph at the end of the definitions.**

#### **M. Health Care Provider**

A Health care provider is defined as a Doctor of medicine or osteopathy who is authorized to practice medicine or surgery in the State of North Carolina, or any other person determined by statute, credential or licensure to be capable of providing health care services which include:

1. Physician assistants
2. Optometrists
3. Podiatrists

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

4. Nurse Practitioners
5. Dentists
6. Nurse midwives
7. Clinical psychologist
8. Chiropractors
9. Clinical social workers
10. Health care providers from whom state approved group and HMO health plans will accept certification of a serious health condition to substantiate a claim for benefits
11. Foreign health care providers in above stated areas who are authorized to practice in that country and who are performing within the scope of the laws
12. Christian Science practitioners listed with First Church of Christian Scientist in Boston, MA. (Note: In this situation, the employee cannot object to an agency requirement to obtain a second or third certification other than a Christian Science practitioner.)

**N. Workweek**

The Workweek is defined as the number of hours an employee is regularly scheduled to work each week including holidays.

**O. Reduced Work Schedule**

A Reduced Work Schedule is defined as a work schedule involving less hours than an employee is regularly scheduled to work.

**P. Intermittent Work Schedule**

An Intermittent Work Schedule is defined as a work schedule in which an employee works on an irregular basis and is taking leave in separate blocks of time, rather than for one continuous period of time, usually to accommodate some form of regularly scheduled medical treatment.

**Q. 12-Month Period**

The 12-month period is measured forward from the date any employee's family and medical leave begins.

**2. Qualifying Exigency Explanation**

When an absence is necessary because a covered service member of the National Guard or Reserves is on active duty or has been called to active duty, following is a list of reasons for which an employee may take leave because of a qualifying exigency.

- a) Short-notice deployment – leave to address any issue that arises from the fact that the employee is notified of an impending call or order to active duty seven or less calendar

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

days prior to the date of deployment. This leave can be used for a period of seven calendar days beginning on the date the employee is notified.

- b) Military events and related activities – leave to attend any official ceremony, program or event sponsored by the military and to attend family support and assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the active duty or call to active duty status of the covered service member.
- c) Childcare and school activities – leave to arrange alternative childcare when the active duty or call to active duty status necessitates a change in the existing childcare arrangement, to provide childcare on an urgent, immediate need basis when the need arises from the active duty or call to active duty, to enroll the child in or transfer the child to a new school or day care facility when necessitated by the active duty or call to active duty, and to attend meetings with staff at a school or a day care facility when such meetings are necessary due to circumstances arising from the active duty or call to active duty status.
- d) Financial and legal arrangements – leave to make or update financial or legal arrangements to address the employee’s absence such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in DEERS, obtaining military identification cards, or preparing or updating a will or living trust.
- e) Counseling – leave to attend counseling provided by someone other than a healthcare provider for oneself, for the covered military member, or for the child provided that the need for counseling arises from the active duty or call to active duty status of a covered military member.
- f) Rest and recuperation – leave to spend time with a covered military member who is on short-term, temporary rest and recuperation leave during the period of deployment. Eligible employees may take up to five days of leave for each instance of rest and recuperation.
- g) Post-deployment activities – leave to attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the employee’s active duty and to address issues that arise from the death of a covered military member while on active duty status, such as meeting and recovering the body of the military member and making funeral arrangements, and
- h) Additional activities where ECSU and employee agree to the leave – leave to address other events which arise out of the covered military member’s active duty or call to active duty status provided ECSU and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

### **3. Covered Employees and Eligibility**

An employee's eligibility for family and medical leave shall be made based on the employee's months of service and hours of work as of the date leave is to commence.

- A.** An employee is eligible if the employee's appointment is Full-time: Permanent, probationary, trainee, or time-limited, and
  1. has 12 months cumulative service with State government, including temporary, and
  2. has been in pay status at least 1040 hours during the previous 12-months.
  
- B.** An employee is eligible if the employee's appointment is Part-time (half-time or more): Permanent, probationary, trainee, or time-limited, and
  1. has 12 months cumulative service with State government, including temporary and
  2. has been in pay status at least 1040 hours during the previous 12-months.
  
- C.** An employee is eligible if the employee's appointment is Temporary, intermittent, or part-time (less than half-time) and
  1. has 12 months cumulative service , and
  2. has been in pay status at least 1250 hours during the previous 12- months.
  3. This leave shall be without pay.
  
- D.** Employment periods prior to a break in service of seven years or more need not be counted in determining whether the employee has been employed by ECSU for at least 12 months.
  
- E.** Time spent in the National Guard or reserves count as time worked to determine eligibility for FML.

### **4. Amount of Leave and Qualifying Reasons for Leave**

- A.** An eligible employee is entitled to a total of 12 workweeks, paid or unpaid, leave during any 12-month period:

Advisory Note: This leave is provided for both spouses even if employed in the same agency.

- i. for the birth of a child and to care for the newborn child after birth, provided the leave is taken within a 12-month period following birth, or

Note: An expectant mother may also take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work, or requires a reduced work schedule.

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

- ii. for the placement of or to care for a child placed with the employee for adoption or foster care, provided the leave is taken within a 12 month period following placement, or

Note: FMLA leave must also be granted before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed.

- iii. for the employee to care for the employee's child, spouse, or parent, where that child, spouse, or parent has a serious health condition, (also, see the Family Illness Leave Policy for extended leave for up to an additional 52 weeks for these reasons) or
- iv. because the employee has a serious health condition that prevents the employee from performing one or more essential functions of the position, or
- v. because of any qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) in the Uniformed Services in support of a contingency operation.

**B. Military Caregiver Leave (Covered Service Member Leave)**

an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member shall be entitled to a total of 26 workweeks of leave during a single 12-month period (commencing on the on the date the employee first takes leave) to care for the covered service member who has a serious injury or illness incurred in the line of duty on active duty for which he or she is undergoing medical treatment, recuperation or therapy; or otherwise in outpatient status; or on the temporary disability retired list.

**If an eligible employee does not take all of his or her 26 workweeks of leave entitlement to care for a covered service member during this "single 12-month period," the remaining part of his or her 26 workweeks of leave entitlement to care the covered service member is forfeited. The 26-workweek entitlement is to be applied as a per-covered service member, per-injury basis such that an eligible employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for different covered service members or to care for the same service member with a subsequent serious injury or illness.**

- C. During the single 12-month period, an eligible employee shall be entitled to a combined total of 26 workweeks of leave under (A) and (B).

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

## **5. Counting the 12 or 26 Weeks Leave**

### **A. Paid or Unpaid Leave**

- i. All approved periods of paid leave and periods of leave without pay (including leave without pay while drawing short-term disability benefits) count towards the 12 (or 26, as appropriate) workweeks to which the employee is entitled. This includes leave taken under the Voluntary Shared Leave Policy.
- ii. Holidays occurring during a FMLA period of a full week count toward the FMLA leave entitlement. Holidays occurring during a partial week of FMLA leave do not count against the FMLA leave entitlement, unless the employee was otherwise scheduled and expected to work during the holiday.
- iii. If ECSU closes for one or more weeks, the days that the university is closed do not count against the employees' FMLA leave entitlement (e.g. a school closing two weeks for the Christmas holidays, or summer vacation).

### **B. Workers' Compensation Leave**

If an employee is out on workers' compensation leave drawing temporary total disability, the time away from work is not considered as a part of the FMLA entitlement.

### **C. Compensatory Leave**

All compensatory time used shall be counted against the employee's FMLA leave entitlement. See the following Leave Charge Options

## **6. Leave Charges Options**

In some cases, the employee has an option to exhaust leave or go on leave without pay. Use of paid leave must be decided upon initial request of leave and used prior to going on leave without pay. The employee has the following options for charging leave:

Note: An Employee may not change their work schedule in order to extend the period of paid leave. Example: An employee may not switch from a 40-hour schedule to a 30-hour schedule in order to lengthen their pay status.

Advisory Note: In compliance with the OSHR FLSA policy, ECSU must require FLSA "subject" employees to use overtime-compensatory time prior to using vacation/bonus leave.

- A. If leave is for birth (applies to both parents) and childcare after birth, the employee may choose to exhaust all or any portion of sick leave and/or vacation/bonus leave or go on

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

leave without pay during the period of disability. Only vacation/bonus or leave without pay may be used before and after the period of disability unless the sick leave policy becomes appropriate for medical conditions affecting the mother or child.

- B.** If leave is for adoption, the employee may choose to exhaust available vacation/bonus leave (or any portion), a maximum of 30 days sick leave (see Sick Leave Policy), or go on LWOP.
- C.** If leave is for foster care, the employee may choose to exhaust available vacation/bonus leave (or any portion) or go on LWOP.
- D.** If leave is for illness of child, spouse, or parent, the employee may choose to exhaust available sick and/or vacation/bonus leave, or any portion, or go on LWOP.
- E.** If leave is for employee's illness, the employee does not have the option of taking leave without pay if sick leave is available; however, the employee may use vacation/bonus leave in lieu of sick leave. If the illness extends beyond the 60-day waiting period required for short-term disability, the employee may choose to exhaust the balance of available leave or begin drawing short-term disability benefits.
- F.** If leave is for a military caregiver, the employee may choose to exhaust available sick and /or vacation/bonus leave, or any portion, or go on LWOP to care for an injured family member.
- G.** If the leave is for a qualifying exigency, the employee may use vacation/bonus leave, or any portion, or go on LWOP when necessitated by one of the qualifying exigency reasons.

## **7. Intermittent Leave or Reduced Work Schedule**

Leave may be taken intermittently or on a reduced schedule for the following:

- A.** When medically necessary, to care for the employee's child, spouse, or parent who has a serious health condition, or because the employee has a serious health condition. (This would also apply to next of kin to care for a service member.)
- B.** Because of any qualifying exigency arising out of the fact that the spouse, son, daughter or parent is on active duty or has been notified of an impending call or order to active duty.

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

- C. When leave is taken after childbirth or for adoption/foster care, the employee may take leave intermittently or on a reduced schedule only if ECSU agrees.
- D. There is no minimum limitation on the amount of leave taken intermittently; however, ECSU may not require leave to be taken in increments of more than one hour.
- E. If leave is foreseeable, based on planned medical treatment, ECSU may require the employee to transfer temporarily to an available alternative position for which the employee is qualified and that has equivalent pay and benefits and better accommodates recurring periods of leave.
- F. Only the time actually taken as leave may be counted toward the leave entitlement.

Example: An employee normally works 40 hours each week. The employee is on a reduced work schedule of 20 hours per week. The FMLA leave may continue for up to 24 calendar weeks.

Procedure: If an employee works a reduced or intermittent work schedule and does not use paid leave to make up the difference between the normal work schedule and the new temporary schedule to bring the number of hours worked up to the regular schedule, ECSU must submit a personnel action form showing a change in the number of hours the employee is scheduled to work. This will result in an employee earning pay and leave at a reduced rate. ECSU remains responsible for paying the employee's medical premium.

## **8. University Responsibilities**

### **A. Notification of FMLA Provisions**

- i. ECSU is required to post and keep posted in conspicuous places a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment.
- ii. In addition to posting the FMLA provisions, handbooks and other written materials must include the general notice information. Where such materials do not exist, ECSU must provide the general notice to new employees upon being hired, rather than requiring that it be distributed to all employees annually.

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

- iii. ECSU is permitted to distribute the handbook or general notice to new employees through electronic means so long as all of the information is accessible to all employees, that it is made available to employees not literate in English (if required), and that the information provided includes, at a minimum, all of the information contained in the general notice.
- iv. Note: ECSU may duplicate and provide the employee a copy of the FMLA Fact Sheet available from the Wage and Hour Division.

## **B. Notice of Eligibility**

- i. When an employee requests FMLA leave, or when ECSU knows that an employee's leave may be for an FMLA-qualifying reason, the employee must be notified of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances. Employee eligibility is determined (and notice must be provided) at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period. 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.
- ii. If the employee is not eligible for FMLA leave, the notice must state at least one reason why the employee is not eligible. Notification of eligibility may be oral or in writing.
- iii. 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 ECSU must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances.
- iv. ECSU shall provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. This notice shall be provided to the employee each time the eligibility notice is provided. If leave has already begun, the notice should be mailed to the employee's address of record. Such specific notice must include, as appropriate:
  - a. That the leave may be designated and counted against the employee's annual FMLA leave entitlement;
  - b. Requirements for the employee to furnish certifications;
  - c. The employee's right to substitute paid leave;

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

- d. Requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments;
- e. The employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial;
- f. The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave; and
- g. The employee's potential liability for payment of health insurance premiums paid by ECSU during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave.

## **9. Designation of Leave as FMLA Leave**

- A.** It is the responsibility of ECSU to:
  - 1. determine that leave requested is for a FMLA qualifying reason, and
  - 2. designate leave, whether paid or unpaid, as FMLA leave even when an employee would rather not use any of the FMLA entitlement.
- B.** ECSU must give notice of the designation to the employee within five business days absent extenuating circumstances. The notice may be oral or in writing, but must be confirmed in writing no later than the following payday.
- C.** If ECSU determines that the leave will not be designated as FMLA-qualifying (e.g., if the leave is not for a reason covered by FMLA or the FMLA leave entitlement has been exhausted), ECSU must notify the employee of that determination.
- D.** For military caregiver leave that also qualifies as leave taken to care for a family member with a serious health condition, ECSU must designate such leave as military caregiver leave first. The leave cannot be counted against both an employee's entitlement of 26 workweeks of military caregiver leave and 12 workweeks of leave for other qualifying reasons.
- E.** The key in designating FMLA leave is the qualifying reason(s), not the employee's election or reluctance to use FMLA leave or to use all, some or none of the accrued leave. ECSU's designation must be based on information obtained from the employee or an employee's representative (e.g., spouse, parent, physician, etc.).
- F.** If ECSU will require the employee to present a fitness-for-duty certification to be restored to employment, ECSU must provide notice of such requirement with the designation notice. If ECSU will require that the fitness-for-duty certification address the

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

employee's ability to perform the essential functions of the employee's position, ECSU must so indicate in the designation notice, and must include a list of the essential functions of the employee's position.

- G.** ECSU must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement.
- H.** ECSU may retroactively designate leave as FMLA leave with appropriate notice to the employee provided that the university's failure to timely designate leave does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, ECSU and the employee can mutually agree that leave be retroactively designated as FMLA leave.

#### **10. Designation of Paid Leave as FMLA Leave**

- A.** When an employee is on paid leave but has not given notice of the need for FMLA leave, ECSU shall, after a period of 10 workdays, request that the employee provide sufficient information to establish whether the leave is for a FMLA-qualifying reason. This does not preclude ECSU from requesting the information sooner, or at any time an extension is requested.
- B.** If an absence which begins as other than FMLA leave later develops into an FMLA qualifying absence, the entire portion of the leave period that qualifies under FMLA may be counted as FMLA leave.

#### **11. Designation of FMLA Leave After Return to Work**

- A.** ECSU shall not designate leave that has already been taken as FMLA leave after the employee returns to work, with two exceptions;
  - i.** if an employee is out for a reason that qualifies for FMLA leave and ECSU does not learn of the reason for the leave until the employee returns to work, ECSU may designate the leave as FMLA leave within two business days of the employee's return; or
  - ii.** if the ECSU has provisionally designated the leave under FMLA leave and is awaiting receipt from the employee of documentation.
- B.** Similarly, the employee is not entitled to the protection of the FMLA if the employee gives notice of the reason for the leave later than two days after returning to work.

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

## **12. Employee Responsibilities**

### **A. Notice**

The employee shall give notice to the supervisor of the intention to take leave under this policy unless the leave is a medical emergency. The notice must follow ECSU's usual and customary call-in procedures for reporting an absence. The employee must explain the reasons for the needed leave in order to allow ECSU to determine that the leave qualifies under the Act.

- i. If the reason for leave is foreseeable and is for birth/adoption/foster care, the employee shall give ECSU not less than 30-day notice, in writing. If the date of the birth or adoption requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable, which means within one or two business days of when the need for leave becomes known to the employee.
- ii. If the reason for leave is foreseeable and is for planned medical treatment, the employee shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations and give not less than 30-day notice. If the date of the treatment requires leave to begin less than 30 days, the employee shall provide such notice as is practicable.
- iii. If the reason for the leave is foreseeable and is due to active duty of a family member, the employee shall provide such notice as is reasonable and practicable.

**B.** If the employee will not return to work after the period of leave, ECSU shall be notified in writing. Failure to report at the expiration of the leave, unless an extension has been requested, may be considered as a resignation

## **13. Certification Requirements For Family And Medical Leave**

### **A. Certification**

- i. The employee shall provide certification in accordance with the provisions listed below. If the employee does not provide medical certification, any leave taken is not protected by FMLA.
- ii. ECSU should request medical certification within five business days after the employee provides notice of the need for FMLA leave.

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

- iii. The employee shall provide a copy of the health care provider's certification within the time frame requested by ECSU (which must be at least 15 calendar days) unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

## **B. Certification Requirements**

Certification shall be sufficient if it states the following:

- i. The date on which the serious health condition commenced;
- ii. The probable duration of the condition;
- iii. The appropriate medical facts within the knowledge of the health care provider regarding the condition
- iv. When caring for a child, spouse or parent, a statement that the employee is needed and an estimate of the amount of time that such employee is needed;
- v. When for the employee's illness, a statement that the employee is unable to perform the functions of the position;
- vi. When for intermittent leave, or leave on a reduced work schedule, for planned medical treatment, the dates on which treatment is expected and the duration;
- vii. When for intermittent leave, or leave on a reduced work schedule for the employee's illness, a statement of the medical necessity for the arrangement and the expected duration;
- viii. When for intermittent leave, or leave on a reduced work schedule, to care for a child, parent or spouse, a statement that the arrangement is necessary or will assist in their recovery and the expected duration.

Note: Medical Certification Form – Form WH-380, developed by the Department of Labor as an optional form for use in obtaining medical certification, including second and third opinions, may be used. Another form containing the same basic information may be used; however, no information in addition to that requested on Form WH-380 may be required.

## **C. Validity of Certification**

If an employee submits a complete certification signed by the health care provider, ECSU may not request additional information; however, health care provider, human resource professional, a leave administrator, or a management official representing ECSU may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical certification. In no case, may the employee's direct supervisor contact the employee's health care provider.

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

If ECSU deems a medical certification to be incomplete or insufficient, ECSU must specify in writing what information is lacking, and give the employee seven calendar days to cure the deficiency.

i. **Second Opinion**

If ECSU has reason to doubt the validity of a medical certification, Human Resources may require the employee to obtain a second opinion with the following conditions:

- a. ECSU bears the expenses, including reasonable “out of pocket” travel expenses.
- b. ECSU may not require the employee or family member to travel outside normal commuting distance except in very unusual circumstance.
- c. Pending receipt of the second (or third) opinion, the employee is be provisionally entitled to FLMA leave.
- d. If the certifications do not ultimately establish the employee’s entitlement to FMLA leave, the leave shall not be designated as FMLA leave.
- e. ECSU is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by ECSU unless the university is located in an area where access to health care is extremely limited.

ii. **Third Opinion**

If the opinions of the employee’s and ECSU’s designated health care providers differ, ECSU Human Resources may require the employee to obtain certification from a third health care provider, again at the university’s expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by ECSU and the employee.

ECSU Human Resources is required to provide the employee, within two business days, a copy of the second and third medical opinions, where applicable, upon request by the employee.

**D. Recertification of Medical Conditions**

- i. ECSU may request recertification no more often than every 30 days unless:
  - a. an extension is requested,

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

- b. circumstances described by the previous certification have changed significantly, or
  - c. ECSU receives information that casts doubt upon the employee's stated reason for the absence.
- ii. If the minimum duration specified on a certification is more than 30 days, ECSU may not request recertification until that minimum duration has passed unless one of the conditions above is met.
  - iii. When the duration of a condition is described as "lifetime" or "unknown," ECSU may request recertification of an ongoing condition every six months in conjunction with an absence.
  - iv. The employee must provide the requested recertification to ECSU Human Resources within the time frame requested (which must allow at least 15 calendar days after ECSU's request is made), unless it is not practicable under the particular circumstances.
  - v. Any recertification requested by ECSU shall be at the employee's expense unless ECSU provides otherwise. No second or third opinion on recertification may be required.

## **14. Certification Requirements for Military Caregiver Leave**

### **A. Certification for Military Caregiver Leave**

- i. **Required Information from the Health Care Provider:**

When leave is taken to care for a covered service member with a serious injury or illness, ECSU may require an employee to obtain a certification completed by an authorized health care provider of the covered service member. If the authorized health care provider is unable to make certain military-related determinations outlined below, the authorized health care provider may rely on determinations from an authorized DOD representative (such as a DOD recovery care coordinator). An agency may request that the health care provider provide the following information:

  - a. The name, address, and appropriate contact information (telephone number, fax number, and/or email address) of the health care provider, the type of medical practice, the medical specialty
  - b. Whether the covered service member's injury or illness was incurred in the line of duty on active duty;

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

- c. The approximate date on which the serious injury or illness commenced, and its probable duration;
  - d. Information sufficient to establish that the covered service member is in need of care and whether the covered service member will need care for a single continuous period of time, including any time for treatment and recovery, and an estimate as to the beginning and ending dates for this period of time;
  - e. If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment appointments for the covered service member, whether there is a medical necessity for the covered service member to have such periodic care and an estimate of the treatment schedule of such appointments;
  - f. If an employee requests leave on an intermittent or reduced schedule basis to care for a covered service member other than for planned medical treatment (e.g., episodic flare-ups of a medical condition), whether there is a medical necessity for the covered service member to have such periodic care, which can include assisting in the covered service member's recovery, and an estimate of the frequency and duration of the periodic care.
- ii. **Required Information from Employee and/or Covered Service Member:**  
In addition, ECSU may also request that such certification set forth the following information provided by an employee and/or covered service member:
- a. The name and address of the agency of the employee requesting leave to care for a covered service member, the name of the employee requesting such leave, and the name of the covered service member for whom the employee is requesting leave to care;
  - b. The relationship of the employee to the covered service member for whom the employee is requesting leave to care;
  - c. Whether the covered service member is a current member of the Armed Forces, the National Guard or Reserves, and the covered service member's military branch, rank, and current unit assignment;
  - d. Whether the covered service member is assigned to a military medical facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit), and the name of the medical treatment facility or unit;
  - e. Whether the covered service member is on the temporary disability retired list;
  - f. A description of the care to be provided to the covered service member and an estimate of the leave needed to provide the care.

The Department of Labor has developed an optional form (WH-385) for employees' use in obtaining certification that meets FMLA's certification requirements. This

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

optional form reflects certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave to care for a covered service member with a serious injury or illness. WH-385, or another form containing the same basic information, may be used by the agency; however, no information may be required beyond that specified in this section. In all instances, the information on the certification must relate only to the serious injury or illness for which the current need for leave exists. ECSU may seek authentication and/or clarification of the certification. However, second and third opinions are not permitted for leave to care for a covered service member. Additionally, recertifications are not permitted for leave to care for a covered service member.

## **15. Certification Requirements for Qualifying Exigencies Leave**

### **A. Certification for Leave for Qualifying Exigencies**

ECSU may require an employee to provide a copy of the covered military member's active duty orders or other documentation issued by the military which indicates that the covered military member is on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation, and the dates of the covered military member's active duty service.

- B.** ECSU may require that leave for any qualifying exigency be supported by a certification from the employee that sets forth the following information:
- i. A statement or description, signed by the employee, of appropriate facts regarding the qualifying exigency for which FMLA leave is requested. The facts must be sufficient to support the need for leave. Such facts should include information on the type of qualifying exigency for which leave is requested and any available written documentation which supports the request for leave; such documentation, for example, may include a copy of a meeting announcement for informational briefings sponsored by the military, a document confirming an appointment with a counselor or school official, or a copy of a bill for services for the handling of legal or financial affairs;
  - ii. The approximate date on which the qualifying exigency commenced or will commence;
  - iii. If an employee requests leave because of a qualifying exigency for a single, continuous period of time, the beginning and end dates for such absence;
  - iv. If an employee requests leave because of a qualifying exigency on an intermittent or reduced schedule basis, an estimate of the frequency and duration of the qualifying exigency; and
  - v. If the qualifying exigency involves meeting with a third party, appropriate contact information for the individual or entity with whom the employee is meeting (such as

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

the name, title, organization, address, telephone number, fax number, and e-mail address) and a brief description of the purpose of the meeting.

- C. DOL has developed an optional form (Form WH-384) for employees' use in obtaining a certification that meets FMLA's certification requirements. This optional form reflects certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave because of a qualifying exigency. Form WH-384, or another form containing the same basic information, may be used by ECSU; however, no information may be required beyond that specified in this Policy.

#### **D. Verification**

If an employee submits a complete and sufficient certification to support his or her request for leave because of a qualifying exigency, ECSU may not request additional information from the employee. However, if the qualifying exigency involves meeting with a third party, ECSU may contact the individual or entity with whom the employee is meeting for purposes of verifying a meeting or appointment schedule and the nature of the meeting between the employee and the specified individual or entity. The employee's permission is not required in order to verify meetings or appointments with third parties, but no additional information may be requested by ECSU. ECSU also may contact an appropriate unit of the Department of Defense to request verification that a covered military member is on active duty or call to active duty status; no additional information may be requested and the employee's permission is not required.

#### **E. Intent to Return to Work**

ECSU may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. ECSU's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation.

If an employee gives unequivocal notice of intent not to return to work, ECSU's obligations under FMLA to maintain health benefits (subject to COBRA requirements) and to restore the employee cease. However, these obligations continue if an employee indicates he or she may be unable to return to work but expresses a continuing desire to do so.

It may be necessary for an employee to take more leave than originally anticipated. Conversely, an employee may discover after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary. An employee may not be required to take more FMLA leave than necessary to resolve the

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

circumstance that precipitated the need for leave. In both of these situations, ECSU may require that the employee provide the agency reasonable notice (i.e., within two business days) of the changed circumstances where foreseeable. ECSU may also obtain information on such changed circumstances through requested status reports.

#### **F. Fitness-For-Duty Certifications**

ECSU may enforce uniformly applied policies or practices that require all similarly situated employees who take leave to provide a certification that they are able to resume work. ECSU may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. Where reasonable job safety concerns exist, ECSU may require a fitness-for-duty certification before an employee may return to work when the employee takes intermittent leave.

### **16. Employment and Benefits Protection**

#### **A. Reinstatement**

The employee shall be reinstated to the same position held when the leave began or one of like pay grade, pay, benefits, and other conditions of employment. ECSU may require the employee to report at reasonable intervals to ECSU Human Resources on the employee's status and intention to return to work. ECSU may require that the employee provide certification that the employee is able to return to work.

Reinstatement is not required if an employee is reduced in force during the course of taking FMLA leave. ECSU has the burden of proving that the reduction would have occurred had the employee not been on FMLA leave.

#### **B. Benefits**

The employee shall be reinstated without loss of benefits accrued when the leave began. All benefits accrue during any period of paid leave; however, no benefits will be accrued during any period of leave without pay.

#### **C. Health Benefits**

The State shall maintain coverage for the employee under the State's group health plan for the duration of leave at the level and under the conditions coverage would have been provided if the employee had continued employment. Any share of health plan premiums which an employee had paid prior to leave must continue to be paid by the employee during the leave period. ECSU must give advance written notice to employees of the terms for payment of premiums during FMLA leave. The obligation to maintain health

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

insurance coverage stops if an employee's premium payment is more than 30 days late. ECSU shall provide 15 day's notice to the employee that coverage will cease.

If the employee's failure to make the premium payments leads to a lapse in coverage, ECSU must still restore the employee, upon return to work, to the health coverage equivalent to that which the employee would have had if leave had not been taken and the premium payments had not been missed without any waiting period or preexisting conditions.

Advisory Note: Even if the employee chooses not to maintain group health plan coverage for dependents or if coverage lapses during FMLA leave, the employee is entitled to be reinstated on the same terms as prior to taking leave, including family or dependent coverage, without any qualifying period, physical examination, exclusion of pre-existing condition, etc. Therefore, ECSU should assure that health benefits coverage will be reinstated; otherwise, ECSU would need to pay the premium and recover it after the employee returns to work.

ECSU may recover the premiums if the employee fails to return to work after the period of leave to which the employee is entitled has expired for a reason other than the continuation, recurrence, or onset of a serious health condition or other circumstances beyond the employee's control. For this purpose, return to work is defined as 30 calendar days; therefore, if the employee resigns any time within 30 days after the return to work, the insurance premium may be recovered unless the reason for the resignation is related to the continuation, recurrence, or onset of a series health condition or other circumstances beyond the employee's control.

## **17. Interference with Rights**

### **A. Actions Prohibited**

It is unlawful to interfere with, restrain, or deny any right provided by this policy or to discharge or in any other manner discriminate against an employee for opposing any practice made unlawful by this policy.

### **B. Protected Activity**

It is unlawful to discharge or in any other manner discriminate against any employee because the employee does any of the following:

- i. files any civil action, or institutes or causes to be instituted any civil proceeding under or related to this policy;

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

- ii. gives, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided by this policy; or
- iii. testifies, or is about to testify, in any inquiry or proceeding relating to any right provided under this policy.

## **18. Enforcement**

### **A. Violations**

Denial of leave requested pursuant to the Family Medical Leave Act is a grievable issue and employees, except for ones in exempt positions (policymaking, exempt managerial, confidential assistants, confidential secretaries and chief deputy or chief administrative assistant), may appeal under the State Personnel Act.

Violations can result in any of the following or a combination of any the following and are enforced by the U.S. Secretary of Labor:

- i. U.S. Department of Labor investigation,
- ii. Civil liability with the imposition of court cost and attorney's fees, or
- iii. Administrative action by the U.S. Department of Labor.

## **19. Posting and Recordkeeping Requirements**

### **A. Posting**

ECSU shall post and keep posted, in a conspicuous place, a notice explaining the FMLA provisions and providing information concerning the procedures for filing complaints of violations of the Act with the U.S. Department of Labor, Wage and Hour Division.

Note: Copies of the required notice may be obtained from local offices of the Wage and Hour Division.

### **B. Records**

ECSU shall be required to keep records for no less than three years and make them available to the Department of Labor upon request.

*Review History: Reviewed by the Policy Review Committee 05/29/20.*

In addition to the records required by the Family Medical Leave Act, ECSU must keep records of the dates FMLA leave is taken, hours of leave if less than a full day, copies of employee notices, documents describing employee benefits, premium payments of employee benefits, and records of any disputes.

Records and documents relating to medical certifications, re-certifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separated files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements, except that:

- i. Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations.
- ii. First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment.
- iii. Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

**C. For Further Information, see the Family Medical Act of 1963.**