

**STOREY COUNTY ADMINISTRATIVE
POLICIES AND PROCEDURES**

NUMBER 605
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01-05-15
AUTHORITY: BOC
COUNTY MANAGER: PAW

SUBJECT: FMLA - Family and Medical Leave Act

1. PURPOSE:

To acknowledge the federal Family Medical Leave Act (FMLA) that was enacted in 1993 to balance the medical and time off demands of the workforce, as well as support the needs of employees' eligible family members.

2. POLICY

Public employers are covered under the Family and Medical Leave Act (FMLA), and will comply with the requirements of the FMLA and advise employees if they meet all the FMLA eligibility requirements. The employer must provide employees with Form WHD-1420 (Employee Rights and Responsibilities under the Family and Medical Leave Act, 2013) and will post and keep posted this notice in a conspicuous place, even if no employees are eligible.

(Note: Employers that have less than 50 employees are not required to provide FMLA leave to their employees as employees will not be independently eligible as defined below in Section 2.1 Eligibility. As of the date of this policy, Storey County is considered to fall under the requirements of FMLA).

2.1 Eligibility

Employees who have been employed by Storey County for a total of 12 months, have worked for Storey County at least 1,250 hours during the preceding 12-month period, and are employed at a work site where 50 or more employees work for the employer within 75 surface miles of that work site are eligible for FMLA leave. Hours that an employee was on vacation or on leave, even if that vacation or leave was paid, do not count toward the calculation of the 1,250 hours worked. However, an employee who has a National Guard or Reserve military service obligation must be credited with the hours of service that would have been performed, but for the period of military service. The required one year of employment does not have to be consecutive. There may be a break in service as long as it does not exceed 7 years. There is an exception to the seven-year condition for National Guard and Reservists and written agreements. All employees meeting the above qualifications qualify for FMLA, regardless of their seasonal, temporary, etc., status.

2.2 Compensation during leave

FMLA leave will be unpaid leave unless the employee has accrued paid leave and is otherwise eligible to use the leave. If an employee requests leave for the employee's own serious health condition, or for the serious health condition of the employee's spouse, child, or parent, to provide military caregiver leave, or exigency leave, the employee must use all of his/her accrued paid annual leave, sick leave (if it qualifies under employer's sick leave use requirements), compensatory time leave, and personal time off as part of the FMLA leave. (See the applicable

collective bargaining agreement for alternate provisions which may apply.) When substituting accrued paid leave, the employee must comply with the employer's procedural requirements, terms, and conditions of the paid leave policy as appropriate; the remainder of the leave period will then consist of unpaid FMLA leave. Employees must be made aware that they are required to use sick, annual, compensatory time, and personal leave as appropriate, in the rights and responsibilities notice Form WH-381 (reference: FMLA Form WH 381: Notice of Eligibility and Rights & Responsibilities).

2.3 Intermittent or reduced schedule leave

When medically necessary (as distinguished from voluntary treatments and procedures), or for any qualifying exigency, leave may be taken on an intermittent or reduced schedule basis. Leave for bonding with a healthy newborn or placement of a healthy child for adoption or foster care is not considered medically necessary and, therefore, may not be taken on a reduced schedule or intermittent basis unless agreed to by the employer. Employees needing intermittent leave or reduced schedule leave must make a reasonable effort to schedule their leave so as not to unduly disrupt the employer's operations. If the leave is foreseeable, the employer may require an employee on intermittent leave or reduced schedule leave to temporarily transfer to an available alternative position for which the employee is qualified if the position has equivalent pay and benefits and better accommodates the employee's intermittent or reduced schedule leave. Intermittent leave and reduced schedule leave reduces the twelve week entitlement only by the actual time used. When an employee who was transferred no longer needs intermittent or reduced schedule leave, the employee must be placed in the same or equivalent position held prior to when the leave commenced.

2.4 Duration and reasons for leave

2.4.1 Duration of leave. Any eligible employee, as defined above, may be granted a total of twelve weeks of unpaid FMLA leave (which can run concurrent with paid leave) during a 12-month period (see exception for Military Caregiver Leave as provided in section 2.5 below). This period is measured backward from the date an employee uses any FMLA leave. A "week" is defined as a calendar week, regardless of the number of days the employee normally works. Twelve weeks does not entitle the employee working three days a week to sixty leave days, but rather twelve weeks.

2.4.2 Reasons for leave. FMLA may be granted for the following reasons:

- The birth of the employee's child and in order to care for the newborn child;
- The placement of a child with the employee for adoption or foster care;
- To care for the employee's spouse, child, or parent who has a serious health condition;
or
- An employee's own serious health condition that prevents the employee from performing one or more of the essential functions of his/her job. Serious health conditions may include conditions resulting from job-related injuries and/or illnesses; or
- Due to a qualifying exigency arising when an employee's spouse, son, daughter, or parent is a military member on covered active duty or has been notified of an impending call to covered active duty.

2.4.3 Conditions for Leave

a. Serious Health Condition. A serious health condition is an illness, injury, impairment, or physical or mental condition of incapacity or treatment that involves:

- Inpatient care (overnight stay) in a hospital, hospice, or residential medical care facility.
- Continuing treatment by (or under the supervision of) a health care provider for a period of incapacity of more than three consecutive full calendar days, combined with at least two visits to a health care provider within 30 days of the first day of incapacity or one visit to a health care provider requiring a regimen of continuing treatment, e.g., prescription medication.
- Unpaid FMLA leave will run concurrently with paid vacation, sick, compensatory time, and/or personal leave, unless otherwise prohibited by any relevant collective bargaining agreement. Unpaid FMLA leave may also run concurrently with workers' compensation leave or other benefits.

b. Exigency:

- Short-term notice deployment (deployment in seven or less calendar days)
- Military events and activities
- Childcare and school activities
- Family support or assistance programs
- Financial and legal arrangements
- Counseling
- Military service member's rest and recuperation leave (limited to 15 calendar days for each instance)
- Post-deployment activities
- Parental leave for the spouse, son, daughter, or parent of a military member for care for the military member's parent who is incapable of self-care. The leave may be used for arranging for alternate care, providing care, admitting or transferring the patient to a care facility, or attending a meeting with care facility staff.
- Additional activities arising out of active duty that the employer and employee agree upon.

c. Covered Active Duty:

- In the case of a member of a regular component of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country.
- In the case of a member 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 in support of a contingency operation.

2.4.4 Limitation of leave

The entitlement to FMLA leave for the birth or placement of a child for adoption or foster care will expire twelve months from the date of the birth or placement. If both an employee and his/her spouse are employed by the employer, their combined time off may not exceed twelve work weeks

during any 12-month period for the birth, adoption, or foster care of a child, or care of a parent with a serious health condition. Each spouse is, however, eligible for the full twelve work weeks within a 12-month period to care for a son, daughter, or spouse with a serious health condition.

Employees may not take more than a combined total of twelve weeks for all FMLA qualifying reasons listed above in Section 6.4.2.

2.5 Military Caregiver Leave

2.5.1 Policy

An eligible employee, as defined in Eligibility Section 2.1. above, may be granted a total of 26 weeks of unpaid FMLA leave (which can run concurrent with paid leave) during a 12-month period to provide caregiver leave for a seriously ill or injured covered servicemember or veteran who is the employee's spouse, son, daughter, parent, or next of kin. This period is always measured forward from the date an employee takes FMLA leave to care for the covered servicemember or veteran and ends twelve months after that date.

Employees cannot take more than a combined total of 26 weeks for military caregiver leave or because of other FMLA qualifying reasons as provided in 2.4 above. A husband and wife both working for the same employer are limited to a combined total of 26 weeks of FMLA military caregiver leave.

2.5.2 Covered servicemember

The Covered Servicemember under the Military Caregiver leave must be:

- a. A current 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 that:
 - Was incurred by the covered servicemember in the line of duty on active duty in the Armed Forces; or
 - Existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces; and
 - May render the member medically unfit to perform the duties of the member's office, grade, rank, or rating.
- b. A covered veteran is an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period* prior to the first date the eligible employee takes FMLA leave to care for the covered veteran who is undergoing medical treatment, recuperation or therapy for a serious injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and manifested itself before or after the member became a veteran, and is:
 - A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed forces and rendered the

servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or

- A physical or mental condition for which the covered veteran has received a U.S. Department of Veteran Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or
- A physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or
- An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veteran Affairs Program of Comprehensive Assistance for Family Caregivers.
- (*) The period between 10-28-09 and 3-8-13 is excluded in the determination of the five-year period.

2.5.3 Limitations of leave

Employees cannot take more than a combined total of 26 weeks for military caregiver leave or because of other FMLA qualifying reasons as provided in 6.4.2. A husband and wife both working for the same employer are limited to a combined total of 26 weeks of FMLA military caregiver leave.

2.6 Notice of Leave

An employee intending to take FMLA leave because of an expected birth or placement or child for adoption or foster care, a planned medical treatment or medical care, or qualifying exigency, shall provide notice for such leave at least 30 days before the leave is to begin. If a requested leave will begin in less than thirty days, the employee must give notice to his/her immediate supervisor as soon as the necessity for the leave is known. Reasonable advance notice is required for all leaves, even if the event necessitating the leave is not foreseeable. If an employee gives less than thirty days notice, the employer may require an explanation.

Within five business days (absent extenuating circumstances) of receiving notice that 1) an employee requests to use FMLA leave, or 2) the employer acquires knowledge that a leave may be for a FMLA-qualifying reason, the employer will complete Form WH-381 (reference: FMLA Form WH-381-Notice of Eligibility and Rights and Responsibilities). Completion of this form will designate if an employee is eligible for FMLA or if an employee is not eligible, the reason(s) why s/he is not eligible. The form will designate if the employee is required to obtain certification related to medical conditions and/or required family relationships. The employer may require the use of FMLA leave for any absence which would otherwise qualify as FMLA leave, even if no formal application for such leave was made by the employee, provided notice is given to the employee. Employees cannot waive, nor may the employer induce employees to waive their rights under FMLA.

2.7 Certification of Leave

2.7.1 Certification forms

- a. Serious health condition

A request for leave based on the serious health condition of the employee or the employee's spouse, child, or parent must be supported by completion of Form WH-380-E (reference: Certification of Health Care Provider for Employee's Serious Health Condition or Form WH-380-F -Certification of Health Care Provider for Family Member's Serious Health Condition) completed by the health care provider. (Note: Attach the employee's current job description to Form 380-E when it is sent to the employee's health care provider.)

The Certification of Health Care Provider form must be completed and returned by the employee within 15 calendar days, absent extenuating circumstances.

b. Exigency leave

Employees requesting FMLA leave for qualifying exigency are required to complete Form WH-384 (reference: FMLA Form WH-384-Certification of Qualifying Exigency for Military Family Leave) and provide a copy of the military member's active duty orders or other documentation issued by the military which indicates that the military member is on covered active duty or call to covered active duty status.

c. Caregiver leave

Employees requesting FMLA leave for military caregiver leave are required to complete Form WH-385 (reference: FMLA Form WH-385-Certification of Serious Injury or Illness of Covered Service member for Military Family Leave) within 15 calendar days, barring absent extenuating circumstances. Employees may also submit invitational travel orders (ITOs) or invitational travel authorizations (ITAs) issued to any family member to join an injured or ill servicemember at his/her bedside in lieu of forms WH-385 or WH-385-V.

d. Incomplete or insufficient certification (cure period)

If a certification is incomplete or insufficient, the employee will be given seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency. If the deficiencies specified by the employer are not cured in the resubmitted certification, the employer may deny the taking of FMLA leave. A certification that is not returned to the employer is not considered incomplete or insufficient, but constitutes a failure to provide certification.

e. Clarification or authentication of certification

Employer may contact the employee's health care provider for the purpose of clarification or authentication after giving the employee an opportunity to clarify specific discrepancies. Only the County Administrative Officer/Personnel Director or County Manager, may contact the health care provider.

f. Second or third opinions

If the employer questions the validity of the certification, the employer may require, at its expense, that the employee obtain a second opinion. If the second opinion conflicts with the original opinion, the employer may require, at its expense, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee. This third opinion will be considered final and binding on both parties.

Second and third opinions are not permitted for leave to care for a covered servicemember when the certification has been completed by a Department of Defense or Department of Veterans Affairs health care provider. However, second and third opinions are permitted

when the certification has been completed by other health care providers as provided for by law.

Second and third options are not allowed on a fitness-for-duty certification.

g. **Recertification**

In instances where the minimum duration of leave anticipated by the original certification is more than 30 days the employer may require the employee to recertify that the original medical condition still exists. Such requests can be made no more frequently than the minimum duration of the leave requested (e.g., 40 days) or once every six months in connection with an absence.

In situations in which the minimum duration of leave anticipated by the original certification is less than 30 days, the employer may request recertification if the employee requests an extension of leave, the circumstances described by the original certification have changed significantly, or the employer receives information casting doubt upon the continuing validity of the certification.

Recertifications are not permitted for leave to care for a covered servicemember.

h. **Annual medical certification**

The employer may require the employee to provide new medical certification, not recertification, for his/her first FMLA-related absence in a new 12-month leave year.

2.8 Designation notice

Within five business days (absent extenuating circumstances) of receipt of all required information, the employer will make a determination if employee's request for leave is for an FMLA-qualifying reason. The employer will complete Form WH-382 (reference: FMLA Form WH-382-Designation Notice) indicating if leave is approved or not and provide to employee

If the employer cannot make a determination from the information provided, they will use this form to:

- a. Indicate the information presented is incomplete or insufficient and provide the employee seven calendar days to provide complete information.
- b. Provide notice to an employee if a second or third medical certification is required.

Employer may also use this form to designate a fitness-for-duty certificate which will be required prior to returning to work.

2.9 Benefits coverage during leave

During a period of FMLA leave, an employee will be retained on the employer's health plan under the same conditions that would apply if the employee was not on FMLA leave. To continue health coverage, the employee must continue to make any contributions that s/he would otherwise be required to make. Failure of the employee to pay his/her share of the health insurance premium may result in loss of coverage.

If the employee fails to return to work after the expiration of the FMLA leave, the employee will be required to reimburse the employer for payment of health insurance premiums during the leave, unless the reason the employee cannot return is due to circumstances beyond the employee's control. The definition of "beyond the employee's control" includes a ~~very~~ large variety of situations such as: the employee being subject to layoff; continuation, recurrence, or the onset of

an FMLA qualifying event; or the employee's spouse's unexpected worksite relocation of more than 75 miles from the current worksite.

An employee is not entitled to the accrual of any seniority or employment benefits during any unpaid leave. An employee who takes FMLA leave will not lose any seniority or employment benefits that accrued before the date the leave began and will be entitled to any unconditional pay increase, such as cost of living increase granted to all employees during the FMLA leave period.

2.10 Outside employment

An employee is prohibited from engaging in outside employment during an FMLA absence if the job conflicts with the reason the employee is on FMLA leave; e.g., an employee is on FMLA leave due to a back injury and works a job requiring heavy lifting. All other requirements of employer's outside employment policy apply.

2.11 Periodic reporting

Any employee on FMLA leave must notify employer periodically of his/her status and intention to return to work. The employer has the authority to determine how often the employee must provide this notification.

2.12 Change in duration of leave

a. Return prior to expiration

If an employee wishes to return to work prior to the expiration of the approved FMLA leave period, s/he must notify the supervisor within two business days prior to the employee's planned return. Employees may be required to provide a fitness-for-duty certification (if indicated on the designation notice) specifically addressing the employee's ability to perform the essential functions of his/her job, prior to returning to work if the FMLA leave of absence was due to the employee's own serious health condition. Employees required to present a fitness-for-duty certification may be delayed in restoration to employment until certification is provided. Second and third opinions are not allowed on a fitness-for-duty certification.

b. Request an extension of leave

An employee who requests an extension of FMLA leave due to the continuation of a qualifying exigency, care for servicemember, continuation, recurrence, or onset of his/her own serious health condition, or of the serious health condition of the employee's spouse, child, or parent, must submit a request for an extension, in writing, to the employer. This written request should be made as soon as the employee realizes that s/he will not be able to return at the expiration of the leave period. Any additional time requested beyond the FMLA 12-week period (or 26-week period for caregiver leave) will not be considered as FMLA. Rather, such time, if approved by the employer, will be characterized as either paid or unpaid leave, thereby ending the employer's reinstatement obligations included in Section 6.4.11. (See the applicable collective bargaining agreement for alternate provisions which may apply.)

2.13 Return from leave

a. Upon returning to work, an employee on FMLA leave will be restored to his/her most recent position or to a position with equivalent pay, benefits, and other terms and conditions of employment. The employer cannot guarantee that an employee will be

returned to his/her original job position. The employer will determine whether a position is an “equivalent position” as defined by FMLA. Employee’s right to restoration, however, ceases at the end of the applicable 12-month FMLA leave year.

Employees may be required to provide a fitness-for-duty certification (if indicated on the designation notice) specifically addressing the employee’s ability to perform the essential functions of his/her job, prior to returning to work if the FMLA leave of absence was due to the employee’s own serious health condition. Employees required to present a fitness-for-duty certification may be delayed in restoration to employment until certification is provided. Second and third opinions are not allowed on a fitness for duty certification.

Key employees may be denied job restoration if such denial is necessary to prevent substantial and grievous economic injury to the operations of employer and the employee was given written notice they were considered a key employee at the time they gave notice of FMLA leave or when the leave commenced.

2.14 Failure to return from leave

Failure of an employee to return to work upon the expiration of a FMLA leave of absence will subject the employee to disciplinary action, up to and including termination, unless the employer has granted an additional (paid or unpaid) extension. (Note: Refer to employer’s other leave policies). Nothing in this policy limits employer’s obligations of reasonable accommodation under the Americans with Disabilities Act, as amended.

Responsibility for Review: The County Personnel Director and/or Administrative Officer will review this policy every 5 years or sooner as necessary.