

Date: August 18, 2009

Code: HR 2009-11

To: CSU Presidents

Reference: HR 99-05; HR 2008-04, and
HR/Benefits 2005-24

From: Gail E. Brooks
Vice Chancellor
Human Resources



Subject: Revised Family Medical Leave Act Regulations – CSU FML Policy Update

Overview

Audience: Human Resources Directors, Benefits Representatives, or other staff responsible for administering leave programs

Action Items: Update Family Medical Leave forms, as appropriate

Affected Employee Groups/Units: Eligible employees

Summary

The Department of Labor released updated Family and Medical Leave Act (FMLA) regulations. The updated regulations, which were effective January 16, 2009, made substantive changes to the law and provided clarification to the military family medical leave provisions that were released in January 2008. This HR Policy Memorandum incorporates the updated FMLA provisions with the California Family Rights Act (CFRA) into the CSU Family Medical Leave policy for ease of administration. Campus designees responsible for CSU Leave Administration should review the remaining portions of this HR Policy Memorandum for additional details regarding this leave.

The federal Department of Labor (DOL) recently completed an exhaustive review of the Family and Medical Leave Act (FMLA) regulations in place since 1995. These changes were effective January 16, 2009. In addition to making substantive changes to the law, the revised regulations also define and clarify the military family medical leave provisions that were added to the FMLA in January of 2008 under the National Defense Authorization Act. Following are key changes in the FMLA law and how these changes impact the California State University (CSU) Family Medical Leave (FML) policy which incorporates both FMLA and CFRA entitlements. Please note that where CSU FML policy differs from a collective bargaining agreement (CBA), the CBA governs for that employee group.

Eligibility

All full-time and part-time employees (excluding student employees) employed for at least one academic year or 12 months preceding the request for FML are eligible. While both FMLA and CFRA have a 1,250 hour work requirement,

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the CSU eliminated this work hour requirement for full-time and part-time employees. Employment for CSU FML purposes includes employment at all CSU campuses as well as other California state employment. Student employees are eligible for CSU FML but must be employed at least one year and must have worked 1,250 hours in the 12 months preceding the leave.

The new regulations permit an employer to exclude employment preceding a break in service of seven (7) years, however, through policy, the CSU will continue to apply all prior service towards the CSU FML entitlement. Additionally, in determining the initial year of eligibility, an employee's service in National Guard or Reserve military duty is applicable.

Employer Notice Requirements

The DOL has consolidated employer notice requirements into one section of the new regulations and placed new notice obligations on employers. The rules clarify that at least four (4) types of FMLA notice must be given by employers: (1) general notice; (2) eligibility notice; (3) rights and responsibilities notice; and (4) designation notice. For CSU, the general notice should provide information regarding FMLA and CFRA leave entitlements with a caveat that CSU FML leave entitlements may be subject to a collective bargaining agreement. The other three notices are employee specific and are triggered upon CSU learning of the employee's need for CSU FML.

The timeframe for employers to provide the notice has changed. If the general notice is not contained in an employee handbook, it must be provided to each employee at the time of hire instead of annually. In addition, the time period to provide the notices after learning of an employee's need for leave has been increased from two (2) business days to five (5).

If an employee is deemed ineligible for CSU FML, the eligibility notice must state at least one reason why the employee is ineligible.

For the first time, the DOL permits the employer to post and provide notices electronically. However, electronic notices will not suffice if employees do not have employer-provided computer access.

Employee Notice Requirements

Employees must continue to provide 30 days' advance notice for foreseeable leave (unless modified by a collective bargaining agreement), or as much advance notice as is practicable. When 30 days' notice is not possible, the employee must give notice to the employer on the same day that s/he learns of the need for leave, or the next business day, after the need arises for unforeseeable leave. If the facts and circumstances make it impracticable for the employee to comply, additional time must be provided.

While the FMLA revised regulations modified employee notice to include enough specific information to enable the employer to determine if the absence is for a qualifying serious health condition, CSU is governed by CFRA regulations which provide expanded privacy protection for employees. Please refer to California Code of Regulations (CCR) 7297.0 et seq.

Qualifying Reasons for FML

Following is the updated list of circumstances that qualify for CSU FML including the new entitlement for Military Exigency Leave. Please note that CSU policy provides FML entitlements for an employee who has a registered domestic partner or a same sex spouse, as defined by the State of California.

1. Birth of son or daughter, and to care for the newborn child.
2. Placement with employee of a son or daughter for adoption or foster care.
3. Care for the employee's spouse, registered domestic partner, or parent with a serious health condition.
4. Employee's own serious health condition that makes the employee unable to perform the essential functions of his/her job.
5. Qualifying Military Exigency Leave (MEL) arising out of the fact that the employee's spouse, registered domestic partner, son, daughter, or parent is on active military duty in the National Guard or Reserve, or has been called to active duty in the National guard or Reserve in a "contingency" military operation.

6. Service Member Care Leave (SMCL) for a covered service member with a serious injury or illness, if the employee is the spouse, registered domestic partner, son, daughter, parent, or next of kin of the service member.

Serious Health Condition

Multiple clarifying changes were made to the different types of medical circumstances that qualify as an FMLA qualifying condition. However, CSU follows the guidelines outlined in CFRA which permit a broader interpretation. For CSU as defined by CFRA, a "serious health condition" is an illness, injury, impairment, or physical or mental condition of the employee or a child, parent, spouse or registered domestic partner of the employee that includes any one of the following:

1. Any period of incapacity or treatment in connection with inpatient care in a hospital, hospice, or residential medical care facility; or
2. Incapacity requiring absence from work, school, or other regular daily activities and requiring continuing treatment by a health care provider.

Normally campuses should initiate the CSU FML notices after an employee is absent for greater than three days. Please note that the number of days required for absence triggering CSU FML notification may vary by collective bargaining agreement.

Health Care Providers

The list of eligible health care providers has been expanded to include Physician Assistants.

Intermittent Leave or Reduced Schedule Leave

The new rules clarify that FMLA leave taken on an intermittent or reduced schedule basis must be accounted for by using an increment no greater than the shortest period of time used to account for other types of leave provided that it is not greater than one hour. Furthermore, leave cannot be deducted for more than the amount of leave actually taken, unless the leave meets the "physically impossible" criteria where the employee is taking intermittent or reduced schedule leave during a shift where the employee is unable to leave (i.e., a laboratory employee unable to enter or leave a sealed "clean room" during a certain period of time). This rule is applicable to CSU.

Light Duty Assignments

Two new rules apply to CSU employees on light duty assignments.

1. An employee who voluntarily accepts a light duty assignment does not waive his/her rights to reinstatement under the FMLA during the period of time he/she is on the light duty assignment. If the assignment is of indefinite duration, the employee is eligible for reinstatement until the end of the 12 month leave period.
2. The time the employee spends working in a voluntary light duty assignment does not count against the employee's 12-week CSU FML entitlement.

Calculation of Leave for Varied and Irregular Schedules and Overtime

When determining CSU FML for employees who have work schedules that vary from week to week, the CSU must compare the number of hours actually worked by the employee in an FMLA workweek to the number of hours the employee would have worked but for the FMLA leave. The result represents the percentage of an FMLA workweek that the employee has taken. The resulting percentage should then be converted to hours and subtracted from the employee's leave allotment.

If the employee's work schedule is so varied that a regular pattern cannot be identified, a weekly average over the 12 months prior to the leave (rather than the prior 12 weeks to the leave) should be calculated and used as the employee's actual average workweek and the amount of CSU FML time taken should be subtracted from that number.

Equivalent Position

The DOL has clarified that an "equivalent position" is one that is "virtually identical" to the employee's prior position. "Virtually identical" relates to pay, benefits, working conditions, including privileges, perks, and status, while "substantially similar" speaks to an employee's duties and responsibilities.

Medical Certification

FMLA regulations provide specific information regarding medical certification; however, the CSU is governed by CFRA which provides employees with expanded protection of their medical information. Clarification of how CSU combines FMLA and CFRA regulations follows.

Employee Medical Certification

Campuses should request the following information when requiring an employee to provide certification for his/her own serious health condition:

1. The date on which the serious health condition commenced.
2. The probable duration of the condition.
3. A statement that, due to the serious health condition, the employee is unable to perform the function of his/her position. The campus should provide a list of the essential job functions on the certification form.

Family Member Medical Certification

General guidelines are provided below.

Campuses may request the following information:

1. The date on which the serious health condition commenced.
2. The probable duration of the condition.
3. An estimate of the amount of time that the health care provider believes the employee needs to care for the individual requiring the care.
4. A statement about whether or not that the serious health condition warrants the participation of a family member to provide care during a period of the treatment or supervision of the individual requiring care.

The campus may require a medical certification from an employee seeking leave for the serious health condition of either the employee or family member. Certification may be required to be submitted within 15 calendar days of requesting the information. The campus can require the certification from a health care provider to include the date on which the condition commenced, the probable duration of the condition, and "appropriate medical facts" regarding the condition. *'Appropriate medical facts' would normally include a doctor's determination that the employee's condition is serious such that it makes the employee unable to perform one or more of the essential job functions.* If the employee requests an intermittent leave or a reduced work schedule, the campus may require that the certification include a statement of the medical necessity for the intermittent or reduced work schedule. The campus may also require an estimate of the length of time the employee will need to be on a modified work schedule and the expected dates and duration of treatment.

If the employee does not comply with the request for medical certification, the campus may delay approval of the leave until the requirement is met, unless it is not practicable for the employee to comply. Subsequent recertifications may be required on a reasonable basis but not more frequently than every 30 days except under unusual circumstances.

Employer Contact with Physicians - HIPAA

The following new provisions are in place when seeking clarification of an employee's medical certification:

1. The employer (definition of employer includes the employer's health care practitioner, human resources professional, leave administrator, management official, or third-party administrator) must first attempt to resolve any deficiency in the certification by contacting the employee.
2. The employee's direct supervisor may not contact the employee's doctor under any circumstances.
3. Only the employer's health care practitioner, human resources professional, leave administrator, management official, or third-party administrator may make such contact.
4. When making contact with the doctor or employee, the employer may not ask about information outside the scope of the certification.

The revised regulations also provide guidelines pertaining to the interaction between the FMLA and HIPAA when an employer contacts the employee's doctor. If an employee's doctor refuses to provide information without a HIPAA-compliant authorization from the employee, the employee has an obligation to provide such an authorization. If the employee refuses and the certification is still unclear the employer may delay or deny the FMLA leave.

Fitness-for-Duty Certification

Employers may seek a fitness-for-duty certification to determine an employee's ability to perform the essential functions of his/her job but only if the employee was provided a list of the essential functions no later than the time the FMLA designation notice was provided to the employee AND specify in the designation notice that the fitness-for-duty certification must address the employee's ability to perform those essential functions. If the employer satisfies this condition, the employee's health care provider must certify whether or not that employee can perform the identified essential functions of his/her job.

Military Family Leave Rights

The Department of Labor issued final regulations that both expand and clarify the Military Family Leave requirements previously released in January 2008.

Military Exigency Leave (MEL)

Military Exigency Leave is a 12 workweek entitlement in a 12 month period and is counted against the CSU FMLA entitlement. The employee is required to exhaust appropriate leave credits prior to going on any unpaid portion of the Military Exigency Leave – CSU FMLA entitlement. This leave is available to a family member of a military member in the National Guard or Reserves; it does not extend to family members of military members in the regular Armed Forces.

The following eight categories of exigency leave are identified:

1. **Short Notice Deployment** – to address an issue arising from a covered military member notified of an impending call or order to active duty in support of a contingency operation seven (7) or less calendar days prior to the date of deployment. Leave taken for this purpose can be used for seven (7) calendar days beginning on the date the covered military member is notified of such operation.
2. **Military Events and Related Activities** – to attend any official ceremony, program, or event sponsored by the military related to the active duty or call to active duty status of a covered military member. Also to attend family support assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross related to the active duty or call to active duty of a covered military member.
3. **Childcare and School Activities** – to arrange for alternative childcare when the active duty or call to active duty status of a covered military member necessitates such a change. This leave does not cover routine child care events but is to provide urgent and non-routine child care when the need arises because of the call to duty.
4. **Financial and Legal Arrangements** – to attend to financial or legal arrangements, such as arranging power of attorney, transferring bank accounts, obtaining military identification and addressing benefit issues related to the call-up.
5. **Counseling** – to seek counseling related to the call to duty or active duty.
6. **Rest and Recuperation (R&R) Leave for a Military Member** – Up to five (5) days of leave may be taken by an employee to spend time with a covered military member who is on R&R leave during a period of deployment. The 5 days may be taken by the employee for each period of R&R leave given to the covered military member.
7. **Post-Deployment Activities** – leave may be taken during the 90 day period following a covered military member's termination of active duty to address issues that may arise following deployment, including dealing with the death of a military member or attending arrival ceremonies and reintegration briefings.
8. **Additional Activities** – to address other events which arise out of the covered military member's active duty or call to active duty status provided that the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

Certification for MEL

As part of the certification for MEL, the employer may require the employee to:

- Provide a copy of the covered military member's active duty orders or other documentation issued by the military in support of a contingency operation, and the dates of the active duty service;
- Require that leave be supported by a certification from the employee that provides the following information:

- Statement or description, signed by the employee, of appropriate facts regarding the qualifying exigency for which FMLA leave is requested;
 - The approximate date the leave will begin;
 - If the leave is for a single, continuous period of time, the beginning and end dates of the absence;
 - If the leave is for intermittent or reduced schedule basis, an estimate of the frequency and duration of the qualifying exigency; and
 - If the leave involves meeting with a third party, appropriate contact information for the individual or entity with whom the employee is meeting and a brief description of the purpose of the meeting; and
- Complete the DOL form (WH-384) that meets the FMLA certification requirements.

If the employee submits a complete and sufficient certification to support his/her request for leave, the employer may not request additional information from the employee. However, if the qualifying exigency includes meeting with a third party, the employer may contact the individual/entity to verify a meeting or appointment schedule and the nature of the meeting. The employee's permission to contact the individual/entity is not required, but no additional information may be requested by the employer.

Please note there is no recertification process, and second and third opinions are not permitted.

Service Member Care Leave (SMCL)

Service Member Care Leave provides an eligible employee who is the spouse (including same sex spouse through state law), registered domestic partner (CSU policy), son, daughter, parent, or "next of kin" of an injured, covered service member with up to 26 workweeks of unpaid leave in a single 12 month period to care for that family member. Again, CSU policy requires the eligible employee to exhaust appropriate leave credits prior to taking unpaid leave.

Please note that federal law requires that Service Member Care Leave must begin on the first day the eligible employee takes such leave and ends 12 months from that date. As a reminder, CSU policy calculates the 12 month FML period on a forward rolling basis: the period is measured forward from the date the employee's first FML leave begins, so this requirement is consistent with CSU policy.

The final regulations clarify that eligible employees are entitled to a combined total of 26 workweeks of Service Member Care Leave and 12 weeks of leave for any other FMLA-qualifying event within a 12 month period.

Next of Kin

DOL has defined "next of kin" as the service member's nearest blood relative, other than the spouse (including same sex spouse through state law or domestic partner through CSU policy), parent, son or daughter, in the following order of priority:

1. Blood relatives who have been granted legal custody of the service member by court decree or statutory provision; or
2. Brothers, sisters, grandparents, aunts, uncles and first cousins, unless the service member has specifically designated, in writing, another blood relative for purposes of this leave.

Covered Service Member

A Covered Service Member under SMLC is any member of the regular Armed Forces, or the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status, or on the temporary disability retired list for a serious injury or illness.

Please note: The Covered Service Member is not required to have a "serious health condition" as currently defined in FMLA regulations, but need only have an injury or illness incurred on active military duty that renders him/her unfit to perform the duties of his/her "office, grade, rank or rating."

Certification for SMLC

The DOL has created an optional certification form that employers may use. The certification may be completed by a Department of Defense (DoD) healthcare provider, a Veteran Affairs healthcare provider, a DoD TRICARE authorized provider, or a DoD non-network TRICARE authorized provider.

The final regulations require employers to accept DoD provided "invitational travel orders" (IVOs) or "invitational travel authorizations" (IVAs) in lieu of the optional certification forms as such documents are provided only in the case of severe injury.

General Information

The final regulations provide the following general information regarding SMLC:

- There is no recertification process, and second and third opinions are prohibited;
- The employer is required to continue paid health benefits provided under the CSU FML policy;
- Leave may be taken on an intermittent or reduced schedule basis;
- If the leave is foreseeable, the employee must provide 30 days' prior notice or give notice as soon as practicable; and
- CSU policy provides separate leave entitlements to spouses or domestic partners employed by the CSU.

Final Regulations, Notices and Resources

The FMLA final regulations and notices may be found at:

<http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763>.

CSU campuses should use or follow the information provided in the medical certification created by the Fair Employment and Housing Commission. The certification may be found at: <http://www.fehc.ca.gov/commission/pdf/health-provider.pdf> . A copy is provided as Attachment A.

The California Department of Fair Employment Housing Commission (FEHC) table titled Comparison Between New Family Medical Leave Act (FMLA) and California Family Rights Act Regulations may be found at: <http://www.fehc.ca.gov/pdf/FMLA-CFRARegsTable-2.pdf>.

Questions may be directed to Human Resources Administration at (562) 951-4411. This HR memorandum is also available on the Human Resources Administration's Web site at: <http://www.calstate.edu/HRAdm/memos.shtml>.

GEB/pc

Attachment

**FAIR EMPLOYMENT & HOUSING COMMISSION
CERTIFICATION OF HEALTH CARE PROVIDER
(California Family Rights Act of 1993 (CFRA))**

1. Employee's Name:

2. Patient's Name (If other than employee):

3. Date medical condition or need for treatment commenced.

[NOTE: THE HEALTH CARE PROVIDER IS NOT TO DISCLOSE THE
UNDERLYING DIAGNOSIS WITHOUT THE CONSENT OF THE PATIENT]:

4. Probable duration of medical condition or need for treatment:

5. The attached sheet describes what is meant by a "serious health condition" under both the federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA). Does the patient's condition qualify under any of the categories described? If so, please check the appropriate category.

(1) (2) (3) (4) (5) (6)

6. If the certification is for the serious health condition of the employee, please answer the following:

Yes No

Is employee able to perform work of any kind?
(If "No", skip next question.)

Is employee unable to perform any one or more of the essential functions of employee's position? (Answer after reviewing statement from employer of essential functions of employee's position, or, if none provided, after discussing with employee.)

7. If the certification is for the care of the employee's family member, please answer the following:

Yes No

- Does (or will) the patient require assistance for basic medical, hygiene, nutritional needs, safety or transportation?

Yes No

- After review of the employee's signed statement (See Item 10 below), does the condition warrant the participation of the employee? (This participation may include psychological comfort and/or arranging for third-party care for the family member.)

8. Estimate the period of time care needed or during which the employee's presence would be beneficial:

9. Please answer the following question only if the employee is asking for intermittent leave or a reduced work schedule.

Yes No

- Is it medically necessary for the employee to be off work on an intermittent basis or to work less than the employee's normal work schedule in order to deal with the serious health condition of the employee or family member?
- If the answer to 9. is yes, please indicate the estimated number of doctor's visits, and/or estimated duration of medical treatment, either by the health care practitioner or another provider of health services, upon referral from the health care provider.

ITEM 10 IS TO BE COMPLETED BY THE EMPLOYEE NEEDING FAMILY LEAVE

****TO BE PROVIDED TO THE HEALTH CARE PROVIDER UNDER SEPARATE COVER.

10. When family care leave is needed to care for a seriously-ill family member, the employee shall state the care he or she will provide and an estimate of the time period during which this care will be provided, including a schedule if leave is to be taken intermittently or on a reduced work schedule:

11. Signature of health care provider:

Date: _____

12. Signature of Employee:

Date: _____

A “Serious Health Condition” means an illness, injury, impairment, or physical or mental condition that involves one of the following:

1. Hospital Care

Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment in connection with or consequent to such inpatient care.

2. Absence Plus Treatment

(a) A period of incapacity of more than three consecutive calendar days (including any subsequent treatment or period of incapacity relating to the same condition), that also involves:

(1) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(2) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

3. Pregnancy [NOTE: An employee’s own incapacity due to pregnancy is covered as a serious health condition under FMLA but not under CFRA.]

Any period of incapacity due to pregnancy, or for prenatal care.

4. Chronic Conditions Requiring Treatment

A chronic condition which:

- (1) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;
- (2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and
- (3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

5. Permanent/Long-term Conditions Requiring Supervision

A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

6. Multiple Treatments (Non-Chronic Conditions)

Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.) severe arthritis (physical therapy), kidney disease (dialysis).