

CITY OF PORTSMOUTH
ADMINISTRATIVE POLICY

#33

MARCH 2015

SUBJECT: Family and Medical Leave

- I. PURPOSE:** The Family and Medical Leave Act (FMLA) was enacted into law on February 5, 1993 and amended by the 2008 and 2010 National Defense Authorization Act (NDAA), the 2013 FMLA Final Rule and the 2015 FMLA Final Rule effective March 27, 2015.
- II. EMPLOYEE LEAVE UNDER FMLA FOR UP TO 12 WEEKS:** The FMLA entitles eligible employees up to 12 workweeks of both paid and/or unpaid leave per calendar year for the following:
1. the birth and care of the employee's newborn child or for the adoption or placement of a foster child with the employee (leave for a newborn child or newly placed child must conclude within 12 months after the birth or placement);
 2. to care for a spouse, parent or child with a qualifying serious health condition (does not include in-laws). The term "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is (A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability. According to the 2015 Department of Labor (DOL) regulations, "spouse" status is determined by the state in which marriage is entered or celebrated. The place of celebration rule "allows all legally married couples, whether opposite-sex or same-sex, to have consistent federal family leave rights regardless of where they live";
 3. when the employee is unable to work because of a qualifying serious health condition as defined under the FMLA regulations;
 4. qualifying exigency leave (as defined by the FMLA and DOL regulation 29 CFR 825.126) arising out of the fact that the employee's spouse, son, daughter, or parent is a military member and is on covered active duty (or has been notified of an impending call or order to covered active duty) which requires deployment to a foreign country. Military member includes members in the Armed Forces, National Guard or Reserves, in support of a contingency operation.

For parental care leave, the parent of the military member must be incapable of self-care and must be the military member's biological, adoptive, step, or foster father or mother, or any other individual who stood in loco parentis to the military member when the member was under 18 years of age. A parent who is incapable of self-care means that the parent requires active assistance or supervision to provide daily self-care.

5. Exceptions to 12 Weeks of FMLA Leave:
 - a. Short-notice deployment of up to seven calendar days of leave is permitted to address any issue that arises from the fact that the military member is notified of an impending call or order to covered active duty seven or less calendar days prior to the date of deployment. Leave taken for this purpose can be used for a period of seven calendar days beginning on the date the military member is notified of an impending call or order to covered active duty;
 - b. Rest and recuperation (R&R) of up to 15 calendar days of leave is permitted to an eligible employee to take with a military member, beginning on the date the military member commences R&R. The employer may request a copy of the R&R orders or documentation.

Beginning on January 28, 2008, FMLA provides up to 26 workweeks for eligible employees caring for a covered service member with a serious injury or illness incurred in the line of duty in accordance with 29 CFR 825.127. See “Covered Service Member Family Leave” in Section X.

The City will comply with the rules and regulations as set forth by the U.S. Department of Labor regarding the Family Medical Leave Act, as amended by federal law and regulations.

III. GENERAL ELIGIBILITY: FMLA leave is available to any full-time or part-time employee who has been employed by the City for at least 12 months, and has worked at least 1,250 hours during the 12 months prior to the start of the FMLA leave.

An employee must use all paid sick leave, annual leave, and may apply for sick leave bank time if eligible, and may apply for the City’s Advanced Sick Leave, before requesting unpaid leave. Any absence which is paid with an employee's compensatory time cannot be applied toward FMLA. Paid leave will be applied to the 12 workweeks of FMLA (and to the up to 26 workweeks for eligible employees caring for a covered service member with a serious injury or illness incurred in the line of duty and on covered active duty. See “Covered Service Member Family Leave” in Section X.).

Workers' compensation leave can count toward an employee's workweeks of FMLA provided the reason for the absence is due to a qualifying serious illness or injury of the employee.

In cases where both spouses are City employees, the leave may be limited to a combined total of 12 workweeks for the birth or adoption of a child, or placement of a foster child.

IV. DEPARTMENT RESPONSIBILITIES: The Departments are responsible for sending their employees the initial FMLA letter with the complete set of appropriate FMLA forms in a timely manner. Within five days of receiving the returned Request for Family and Medical Leave form, or as soon as practicable, that determines whether the leave qualifies as FMLA, the employee's department will notify the employee on the Designation Notice form whether the leave has been approved. The Department Head should also complete the bottom of the Request for Family and Medical Leave form and return it along with a Personnel Transaction Data form (PTR), showing that the employee has initiated FMLA leave, to the Human Resource Management Department (HRM). Departments are also responsible for requesting that their employees provide a Return to Work certification from the City's Health Care Provider prior to returning to work at the end of their FMLA leave. The Department Head must also submit a returning PTR showing that the employee's FMLA leave has ended to HRM.

V. REQUESTING FMLA LEAVE: An employee must provide as much advance notice (preferably 30 days) regarding a need for FMLA leave. An employee who requests leave or any employee with absences of more than three consecutive work days (excluding annual leave) will be asked to complete a Request for Family and Medical Leave form. Depending on the type of leave requested, employees will also be asked to have their health care provider complete a Medical Certification Form. Both the Request for Leave and the Medical Certification Form should be returned within 15 days directly to the City's Health Care Provider. The City's Health Care Provider will not conduct a medical examination of the patient. They will evaluate the certification form and determine if the leave qualifies as FMLA. **UNDER NO CIRCUMSTANCES SHOULD THE CERTIFICATION OF HEALTH CARE PROVIDER FORM BE TAKEN TO YOUR DEPARTMENT.** If no medical certification is needed, you need to return the Request for Leave form to your supervisor.

The City reserves the right to request a second or third opinion to verify the need for leave, at the City's expense.

FOR INTERMITTENT LEAVE – In the event that the leave is for care of a spouse, child or parent who has a qualifying serious health condition, the leave may be taken intermittently, or on a reduced time basis, such as working fewer hours in a week or working fewer hours in a day, but only if such a schedule is needed for medical reasons, with appropriate documentation. However, leave may not be taken intermittently in the event of childbirth, the adoption of a child, or placement of a foster child.

VI. RETURNING TO WORK: In order to accommodate department operations, the employee is requested to notify their supervisor in writing at least two weeks prior to the expiration date of the leave advising of their planned date of return.

At the end of the 12 workweeks (or up to 26 workweeks for eligible employees caring for a covered service member with a serious injury or illness incurred in the line of duty in accordance with 29 CFR 825.127), the Department Head has the following options:

- a. If the employee returns at the end of the 12 workweek period (or up to 26 workweeks for eligible employees caring for a covered service member with a serious injury or illness incurred in the line of duty in accordance with 29 CFR 825.127), the employee is guaranteed reinstatement to the same or equivalent position as defined in the FMLA regulations and law.
- b. If it is medically certified that the employee cannot return to work at the end of the 12 workweeks (or up to 26 workweeks for eligible employees caring for a covered service member with a serious injury or illness incurred in the line of duty in accordance with 29 CFR 825.127), the employee may be allowed to remain on leave and receive payroll payment of accrued leave, if applicable, for the remainder of the medically necessary absence. The employee has no guarantee of continued employment beyond the first 12 workweeks of leave (or up to 26 workweeks for eligible employees caring for a covered service member with a serious injury or illness incurred in the line of duty in accordance with 29 CFR 825.127). The Department Head will base this decision on the business needs of the department with approval from the City Manager.

Prior to returning from leave, employees will be requested by their Department to obtain a return to work certification from the City's Health Care Provider. Should the employee fail to return to work at the end of the 12 workweeks (or up to 26 workweeks for eligible employees caring for a covered service member with a serious injury or illness incurred in the line of duty in accordance with 29 CFR 825.127) of FMLA leave, without departmental approval for a leave continuance, such failure to return will be treated as job abandonment.

VII. BENEFITS DURING LEAVE: Employees will retain their group medical care coverage during FMLA leave. During periods of unpaid leave, the employee may continue hospitalization and life insurance coverage by making payments of the employee's share of such coverage directly to the Payroll Office. Should the employee fail to pay his/her share of the premium for more than 30 days, the City must notify the employee in writing of the amount of overdue payment. Unless payment is received within 15 days of the date of the letter, coverage will be terminated.

Vacation and sick hours, will accrue during any paid leave period. When the leave is unpaid, vacation and sick hours will not accrue.

VIII. SECONDARY EMPLOYMENT PROHIBITED: Employees are prohibited from working second jobs while out on paid or unpaid FMLA leave. Employees found in violation of this requirement will be subject to disciplinary action.

IX. KEY EMPLOYEES: The City reserves the right to deny reinstatement of employment for "key employees" in accordance with the FMLA regulations and approval of the City Manager.

- X. **COVERED SERVICE MEMBER FAMILY LEAVE:** The 2008 AND 2010 National Defense Authorization Act (NDAA) and the 2013 Final Rule amended the Family Medical Leave Act of 1993. The 2013 FMLA Final Rule provided additional amendments pertaining to military caregiver leave. Up to 26 workweeks of FMLA leave may be taken within a single 12 month period as follows:

“Eligible Employee” means an employee who is the spouse, son, daughter, parent, or next of kin of a covered service member including covered veterans, as defined under the regulations, shall be entitled to a combined total of up to 26 workweeks of FMLA leave during a single 12-month period to care for a covered service member or veteran who is undergoing medical treatment, recuperation, or therapy or is otherwise in outpatient status or on the temporary disability retired list for a serious injury or illness.

“Single 12-month period” begins from the date of an employee’s first FMLA leave to care for the covered service member and ends 12 months after that date. It may last for up to 26 workweeks of leave entitlement to care for the covered service member. This leave year differs from the calendar leave year used for all other forms of FMLA qualifying leave, including exigency leave.

“Covered service member” means a member of the Armed Forces, including the National Guard or Reserves, and a veteran who was a member of the Armed Forces at any time during the period of five years preceding the date on which the veteran undergoes the medical treatment, recuperation or therapy. The period between enactment of the FY2010 NDAA on October 28, 2009 and the 2013 Final Rule, effective March 8, 2013, is excluded in the determination of the five-year period for covered veteran status.

“Serious injury or illness” means:

- a. In the case of a current member of the Armed Forces, including a member of the National Guard or Reserves, means an injury or illness that was incurred by the covered service member in the line of duty on active duty in the Armed Forces or that 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 that may render the member medically unfit to perform the duties of the member's office, grade, rank or rating; and,
- b. In the case of a covered veteran, means an 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. (See 29 CFR 825.127)

This leave may be taken intermittently or on a reduced leave schedule when medically necessary.

If FMLA leave for military caregiver purposes is requested for a planned or foreseeable medical treatment, the employer may require the employee to provide 30 days notice, or as much notice as is practicable, and the employer may transfer the employee temporarily to an available alternative position for which the employee is qualified and that:

- a. has equivalent pay and benefits, and
- b. better accommodates recurring periods of leave than the regular position.

An eligible employee must use all accrued paid sick leave, annual leave, or compensatory leave before requesting unpaid leave. If both spouses are City employees, the FMLA leave of both employees shall be limited to a combined total of 26 workweeks for serious injury or illness care of a service member.

If any event qualifies for up to 12 workweeks of FMLA leave and another event qualifies for up to 26 workweeks of FMLA leave, then an eligible employee shall only be entitled to a combined total of 26 workweeks within a single 12-month period.