


**MEMORANDUM**  
**Department of Administration**

**State of Alaska**

To: All Human Resources Managers

Date: April 21, 2003

From: Dianne Corso  
Director   
Division of Personnel

Phone: 465-4429

Subject: Personnel Memorandum 03-02  
Family and Medical Leave Acts

Supersedes Personnel Memoranda 97-1, 96-1, and 96-1a

The Alaska Family Leave Act (AFLA) (Chapter 96 SLA 1992) became effective September 16, 1992. The federal Family and Medical Leave Act of 1993 (FMLA) became effective August 5, 1993. This memorandum provides guidance on implementing these acts for State employees.

This memorandum replaces Personnel Memorandum 97-1. Information has been updated to reflect changes created by bargaining unit agreements, to provide guidance on issues not previously addressed, and to clarify earlier memoranda. In addition, a Subject Index has been created.

As further changes occur in statute, regulation, court interpretation or policy, this memorandum will be updated and will replace the previous version. Questions regarding the payroll or benefits portions of these laws not answered here should be addressed to the divisions of Finance and Retirement and Benefits respectively. Questions regarding the policies found herein should be addressed to Sheri Gray of my staff.

Cc: Kevin Jardell, Assistant Commissioner  
Labor Relations Section  
David Jones, Assistant Attorney General  
Division of Personnel staff

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**OVERVIEW OF THE ACTS**

FMLA and AFLA place additional requirements on the State and provide additional benefits to our employees. However, FMLA and AFLA supplement rather than replace other laws, contractual requirements, and our own policies and practices regarding leave. Thus, FMLA and AFLA must be applied in harmony with all related statutes, regulations, and guidelines. Requirements such as calling a supervisor within 15 minutes after scheduled starting time to report medical leave (or 15 minutes before the start of shift, or whatever the office practice might be) are unchanged by FMLA and AFLA.

Because FMLA and AFLA supplement other provisions, the following principle applies: the employee is entitled to the most generous benefit provided by any applicable source. Whenever provisions under FMLA are more generous, apply the federal regulations. Whenever provisions under AFLA are more generous, apply the State regulations. Whenever an applicable collective bargaining provision is more generous, apply that provision.

On the other hand, the employer does have some decisions to make and options to choose. The State of Alaska's decisions are reflected in the question and answer sections below. The decisions reflect the following: where there is an entitlement under more than one federal or state law or regulation or collective bargaining agreement, the use of leave will be considered as use for all entitlements and the leave time will run concurrently.

FMLA has very specific notice requirements for the posting of notices, for notifying an employee of specific rights and obligations at the time the supervisor is made aware of an employee's intent to use family leave, and when an employee's family leave entitlement is invoked. Some questions are reviewed in Section V below. Careful review of the full requirements is encouraged. (See 29 CFR Part 825, Subpart C.)

Implementation of FMLA and AFLA will add material to, or require the establishment of, employee medical files. All information with regards to an employee's medical history (past and current) shall be kept in these medical files. These files must be kept separate from the employee's personnel or other files, as is required by the Americans with Disabilities Act, and must be kept confidential. This means the medical files must be kept in a locked cabinet separate from the one(s) containing other employee, leave, or payroll files. When an employee of one department separates or transfers to a different department, the employee's medical file shall be transferred to the Employee Records Unit in the Division of Personnel for retention. The department receiving the employee may access or retrieve the medical files as needed for the administration of family leave, ADA, workers' compensation, etc. Be sure to specify on all medical files transmitted that they are medical files and not to be incorporated with the employee's personnel file.

We have adopted the following convention throughout this memorandum to distinguish the use of leave for pregnancy, childbirth, placement for adoption, etc., from leave for a serious health condition. The former is referred to as "parental leave" and the latter as "medical leave." A provision that applies to either (or both) leave type is referred to as "family leave." The meaning of each of these terms is different under the FMLA and AFLA. Specific references to the federal and state laws use "FMLA" and "AFLA" respectively. Table 1 compares major differences in provisions between FMLA and AFLA.



**SECTION I. BASIC FAMILY LEAVE INFORMATION****1. What are the thresholds?**

FMLA: The applicable thresholds for FMLA are having worked for the State for at least 12 months (need not be consecutively), having worked for the State for 1,250 hours over the past 12 months, and working in a location with at least 50 employees in a 75 mile radius. The work site of an employee is ordinarily the site the employee reports to or, if none, the site from which the employee's work is assigned. The 75-mile radius is measured in surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the eligible employee needing leave is employed. Absent available surface transportation between work sites, the distance is measured by using the most frequently utilized mode of transportation.

AFLA: The applicable thresholds for AFLA for employees exempt from coverage of AS 39.20.200-330 (see AS 39.20.310) are having been employed (regularly scheduled to work) by the State for at least 35 hours per week for at least six consecutive months or for at least 17 1/2 hours per week for at least 12 consecutive months immediately preceding the leave, and having worked at a location that had at least 21 employees within 50 road miles during any period of 20 consecutive workweeks in the preceding two calendar years. For employees subject to AS 39.20.200-330, AFLA leave is available immediately upon employment with no restrictions on length of service, number of hours employed, or size of the local work force.

AS 23.10.500

29 C.F.R. 825.110

See Table 1

**2. Do leave and holidays count toward meeting the employment threshold of hours worked, i.e., the service requirement?**

FMLA: No. Only the hours actually worked (including overtime) count toward meeting the FMLA's service requirements.

AFLA: Yes. The AFLA service requirements are based on being employed by the State. "Employed by" includes all the benefits that go with employment such as leave and holidays, including approved leave without pay. Thus, for example, a full-time (normally assigned a 37 1/2 hour per week schedule) temporary employee would qualify for leave under AFLA after six months, and would not have the threshold jeopardized because the office was closed for a holiday and the employee worked only 30 hours in that week. Further, the threshold is not jeopardized when an employee takes approved leave without pay to cover the absence. The individual remains "employed by" the State during such periods. In contrast, for AFLA purposes only, individuals in seasonal positions are not "employed by" the State during the seasonal leave without pay periods.

AAM 280.380

29 C.F.R. 485, 825.110 (c), 825.205



**SECTION I. BASIC FAMILY LEAVE INFORMATION**

3. **Could an employee who qualifies under AFLA, later qualify for the FMLA entitlement (i.e., state paid health insurance), when, and if, they meet the FMLA employment threshold?**

Yes. For example, an employee with over a year of prior service is hired and works full time for six months (975 hours). The employee is eligible only for AFLA benefits at this time. A qualifying condition develops and the employee takes 17 weeks (approximately four months) off. The employee returns to work for two months (325 hours). The employee is now eligible for FMLA (due to having worked 1300 hours in the preceding year) and could take 12 weeks of leave, with insurance coverage, for a qualifying condition.

Health insurance for the first twelve weeks of AFLA leave is ONLY provided to those employees who are excluded from FMLA coverage.

29 C.F.R. 825.110                      See Table 1

4. **Would an employee who was employed for 30 hours a week for eight months be covered under AFLA because the total hours worked would exceed the 35 hours a week for 6-month period threshold?**

No. The threshold requirement is set for the specific hours of employment for the specified duration.

AS 23.10.500(b)

5. **Who is responsible for assuring the employee meets the applicable employment threshold under the state and/or federal act?**

The department human resource office, with the assistance of field staff, is responsible.

AAM 280.380

6. **Are nonpermanent or temporary employees covered by these statutes/regulations?**

Yes. The federal act and the state act cover temporary or nonpermanent employees who meet the thresholds.

AS 23.10.500                      29 C.F.R. 825.110

**SECTION I. BASIC FAMILY LEAVE INFORMATION****7. Are there other employees who are excluded from coverage?**

FMLA: Yes. Under FMLA (29 USC 825.101(3)), the definition of "employee" is the same definition of "employee" that is provided by the Fair Labor Standards Act (FLSA) (29 USC 203(e)). The FLSA excludes from the definition of employee any individual employed by a state who is not subject to the civil service laws of the state and who:

- holds a public elective office,
- is selected by the holder of such an office to be member of the elected official's personal staff,
- is appointed by such an officeholder to serve on a policy making level,
- is an immediate adviser to such an officeholder with respect to the constitutional or legal power of the office, or
- is an employee of the legislative branch and is not employed by the legislative library.

AFLA: There are no further exclusions under AFLA. (See AS 39.20.310 for PX, XE, and EE employees.)

AS 39.20.310            29 C.F.R. 825.800

**8. How is intermittent leave calculated for part-time employees?**

A part-time employee is entitled to intermittent leave on a pro rata basis of the normally scheduled hours of work per week.

If an employee is normally scheduled to work 30 hours a week, the intermittent hours are calculated based on 30 hours multiplied by the number of weeks to which they are entitled. In this example the entitlement would be as follows:

FMLA: 12 workweeks (30 hours each) in each 12-month period is 360 hours of entitlement to be used on an intermittent basis.

AFLA: 18 workweeks (30 hours each) in a 24-month period for medical leave is 540 hours of entitlement to be used on an intermittent basis.

If the part-time employee's schedule varies week to week, a weekly average of the hours worked over the 12 weeks prior to the beginning of the leave period is used for calculating the employee's normal workweek.

29 C.F.R. 825.205



**SECTION I. BASIC FAMILY LEAVE INFORMATION**

9. Does a legal holiday, which occurs during a period of family leave, extend the employee's allowable time away from work?

When FMLA leave is taken in a single block of time, the answer is "no." FMLA regulations provide, "For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect, the week is counted as a week of FMLA leave."

For FMLA leave taken intermittently or on a reduced leave schedule, the answer generally is "yes." Federal regulations provide, "If an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted . . .". However, like FMLA leave taken as a single block of time, intermittent leave taken in substantial blocks of time (e.g., a three week trip every three months for out of State treatment) would count a holiday that is part of a full week of leave as FMLA leave. The holiday is counted as FMLA leave when a minimum of five consecutive work days is used as intermittent leave prior to the holiday.

The State applies these same standards to the use of AFLA leave.

Since the State has chosen to require parental leave after delivery and recovery or post-placement to be taken in a single block of time, a holiday does not extend the employee's allowable time away from work for these purposes.

Departments continue to need to track FMLA and AFLA leave manually until automated system requirements are identified and implemented. Tracking can be done on an hourly basis. For example, an employee on a 37.5 hour per week schedule is entitled to 450 hours of FMLA leave and 675 hours of AFLA leave in the appropriate periods. It will be necessary to properly account for holidays per the preceding paragraphs in determining when the respective entitlements are exhausted.

29 C.F.R. 825.200(f), 205(a)

10. When does the eligible employee's family leave begin if the employee is on seasonal LWOP or is laid off?

Family leave will begin when/if the employee is recalled to work and meets the threshold requirements.

29 C.F.R. 825.112(f)

11. To what extent does a seasonal employee's entitlements under the act extend beyond the end of the season.

The employee is not entitled to wages or employer paid health coverage beyond the end of the employee's season. Upon the beginning of the next season, if the employee continues to be eligible for family leave, the remaining balance of the entitlements will continue (leave, health coverage, etc.), if within the 12- or 24-month entitlement period.

AS 23.10.500(d)

29 C.F.R. 825.112(f)

**SECTION I. BASIC FAMILY LEAVE INFORMATION**

12. Seasonal leave without pay makes it difficult for seasonal employees to meet the FMLA's eligibility requirement that an employee must have worked 1250 hours in the 12 months prior to requesting leave (or AFLA's required employment of 35 hours per week for six consecutive months or 17 1/2 hours per week for 12 consecutive months immediately preceding the leave). Is it correct that in many cases seasonal employees will not qualify for family leave?

Yes. Threshold requirements must be met to qualify for family leave.

13. Is the employer required to provide continued major medical coverage for eligible employees on family leave?

FMLA: The FMLA requires the State to provide, for the first 12 weeks of family leave, the same level of health insurance coverage provided prior to the leave. Those employees in bargaining units that are required to pay a "buy-up" portion of their major medical premium must pay their portion in order to continue the coverage. Permanent part-time employees must pay their portion of the major medical premium, if selected, to continue coverage under this plan.

Other benefits such as SBS options and travel and accident insurance will continue while the employee is in paid status; however, the employee must continue to pay their portion of the premiums. The non-medical and optional benefits will cease when the employee enters leave without pay.

AFLA: The State will provide health insurance for the first twelve weeks of leave under AFLA for those employees who are covered under AFLA but excluded from FMLA coverage provided that the employee has been in paid status for 31 days. This applies to those employees covered under AS 39.20.220 such as certain employees of the legislature as well as employees assigned to a location of 20 - 50 employees

AS 23.10.500(d), 20.220

29 C.F.R. 825.209

14. Can employees on family leave retain leave on the books when entering into leave without pay?

Employees subject to AS 39.20.200-.310 may retain up to five days of leave on the books during qualified AFLA leave only. This would include, for example, Partially Exempt employees, Excluded Employees, Exempt employees not in a bargaining unit (e.g. non-temporary employees of the legislature, governor's staff, Permanent Fund Corporation). Once the employee has opted to retain leave, that leave cannot be used for an AFLA leave condition until the AFLA leave entitlement is exhausted.

Employees covered by a collective bargaining agreement are subject to the terms of the agreement. Provisions of all bargaining unit agreements should be carefully reviewed before advising an employee.



**SECTION I. BASIC FAMILY LEAVE INFORMATION**

- 15. Once an employee has elected not to use accumulated leave for an AS 39.20 AFLA absence, can the employee later change his or her mind in order to extend the leave of absence?**

An employee who chooses to retain leave while on an AS 39.20 AFLA leave cannot later change his/her mind and decide to use the retained leave for the AFLA absence. However, once the AFLA entitlement has been exhausted, the employee can use the retained leave for any qualifying reason, including the original AFLA event or condition.

AAM 280.520

- 16. How does the employee notify the employer of the need to invoke family leave entitlements?**

The employee advises the supervisor he/she is requesting leave and states a qualifying reason. The State requires notice in writing (a Leave Request/Report form, Form 02-035 satisfies the written notice requirement), but where extenuating circumstances prevent it the employee may still invoke the entitlement verbally.

The State chooses to require a Certification of Health Care Provider (attachments A and B) to document the employee's need for medical leave that exceeds three consecutive work days, unless the department head is otherwise satisfied the leave is for medical reasons.

NOTE: Administration of family leave possesses different circumstances than collective bargaining agreement language that talks about other leave situations.

AS 23.10.510 & 39.20.305(b)                      29 C.F.R. 825.302

- 17. Is it ever permissible for the supervisor or a representative of the employee to invoke the employee's family leave entitlement?**

Yes. In all circumstances, it is the State's (employer's) responsibility to designate leave (paid or unpaid) as family leave qualifying, and to notify the employee.

For FMLA, the designation must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc.). When the State does not have sufficient information about the employee's use of paid leave, the supervisor or human resources office must inquire further of the employee or the spokesperson to ascertain whether paid leave is potentially FMLA-qualifying. The inquiry may seek information similar to the information on the Certification of Health Care Provider form, but no additional information. A conditional determination may be made subject to a final determination when the Certification of Health Care Provider is completed.

A checklist to aid the supervisor in determining whether to designate the leave as FMLA and/or AFLA leave is attachment D.

## **SECTION I. BASIC FAMILY LEAVE INFORMATION**

An employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave so as to allow the State to determine if the leave qualifies under FMLA. If the employee fails to explain the reasons, leave may be denied.

29 C.F.R. 825.208

### **18. What is the definition of health care provider?**

FMLA: Doctors of medicine and osteopathy authorized by the state in which the doctor practices;

Podiatrists, dentists clinical psychologists, optometrists, and chiropractors authorized to practice in the state and performing within the scope of their practice as defined under state law;

Nurse-midwives, nurse practitioners, and clinical social workers who are authorized to practice under state law and who are performing within the scope of their practice as defined under state law;

Christian Science practitioners listed with the First Church of Christ, Scientists, Boston, Massachusetts;

Any health care provider from whom the State's health insurance carrier or administrator or a health trust covering our employees accepts certification of the existence of a serious health condition to substantiate a claim for benefits;

A health care provider listed above who practices in another country who is authorized to practice in accordance with the law of that country and who is performing within the scope of the practice as defined under such law.

AFLA: Dentists licensed under AS 08.36; Physicians licensed under AS 08.64; and Psychologists licensed under AS 08.86.

29 C.F.R. 825.118

### **19. Who defines the 12- or 24-month periods for family leave?**

The State chooses the method for determining (defining) the "12-month period" under FMLA. AFLA specifies 18 workweeks may be taken in "any 24-month period." The State has chosen to start counting the 12- and 24-month periods from the day the family leave began.

29 C.F.R. 825.200(b)



**SECTION I. BASIC FAMILY LEAVE INFORMATION****20. How much family leave is the employee entitled to in a 24-month period?**

FMLA: 12 workweeks in each 12-month period or 450 hours if used intermittently.

AFLA: 18 workweeks in a 24-month period for medical leave and 18 workweeks in a 12-month period for parental leave (consecutive after recovery from delivery or after placement for adoption) or 675 hours if used intermittently.

The leave entitlements run concurrently whenever possible.

AS 23.10.500            29 C.F.R. 825.100

**21. Can employees on family leave qualify for unemployment insurance?**

Individuals must be able and available to work to be eligible for unemployment insurance (U.I.) compensation. The family leave qualifying condition would generally negate U.I. eligibility; however, employees on family leave may be eligible for U.I. in certain specific circumstances. The Employment Security Division in the Department of Labor makes eligibility determinations.

AS 23.20.378-379

**22. Can an agency impose discipline for abuse of parental or medical leave under FMLA or AFLA?**

Yes. Appropriate discipline may be imposed for documented abuse.

Abuse may take several forms; the investigation before imposing discipline and the type of discipline is driven by the particular facts and circumstances. For example, leave conditionally determined to be FMLA leave, if not supported by the Certification of Health Care Provider, need not be approved as leave at all if business does not permit the absence. The period would become unauthorized leave without pay and carry its consequences in addition to any other discipline that may result. The supervisor should notify the employee at the time the conditional leave begins of the consequences of not providing a Certification of Health Care Provider (CHCP) or if the CHCP does not support FMLA leave.

Another example is an employee seen in public participating in activities inconsistent with the condition underlying the medical leave. FMLA allows the State to request a second (and third) medical opinion when it doubts the validity of the medical certification. (See questions and answers 13 and 14 in Section II below.) FMLA also permits the State to request a new certification if it receives information that casts doubt upon the employee's stated reason for the absence (for pregnancy, chronic, or permanent/long-term conditions under continuing supervision of a health care provider) or if it receives information that casts doubt upon the continuing validity of the certification (for minimum periods of incapacity greater than 30 days or for leave taken intermittently or on a reduced schedule).

**SECTION I. BASIC FAMILY LEAVE INFORMATION**

If improper use of sick leave or personal leave for medical reasons is suspected, the employee may be required to provide a Certification of Health Care Provider for any medical leave.

See applicable collective bargaining agreement      29 C.F.R. 825.307(2), 308(a)(2), 311(b)

**23. Does the supervisor have the right to question the nature of the requested leave if necessary?**

Yes. If the supervisor has reason to doubt whether an absence qualifies for family leave, further inquiry of the employee or the employee's spokesperson must be made, but no more information may be sought than provided on the Certification of Health Care Provider. In addition, the State has chosen to require a CHCP whenever medical leave is used for more than three consecutive work days unless the department head is otherwise satisfied that the leave is for medical reasons.

If the supervisor finds the certification to be incomplete, the supervisor shall advise the employee and provide the employee a reasonable opportunity to cure any deficiency. Direct contact by the supervisor with the employee's health care provider is not permitted by FMLA. However, a health care provider representing the State may, with the employee's permission, contact the employee's health care provider for purposes of clarification or authenticity of the medical certification. Further review by a second and possibly third medical opinion is discussed in questions and answers 13 and 14 in Section II.

See applicable collective bargaining agreement      29 C.F.R. 825.302(c), 307(a)

**24. If an employee is using what appears to be an excessive amount of leave for sick purposes, should the supervisor or human resources office attempt to determine if FMLA or AFLA medical leave is appropriate?**

Yes. It is recommended that a meeting be held with the employee to explain the family leave entitlement and to determine if medical leave should be requested by the employee or invoked by the agency.

29 C.F.R. 825.208(a)

**25. If an employee refuses to apply for family leave for a qualifying condition, should the employing agency invoke family leave?**

Yes, family leave must be invoked for all qualifying conditions if the employee otherwise qualifies for family leave.

29 C.F.R. 825.208



**SECTION I. BASIC FAMILY LEAVE INFORMATION**

- 26. Can banked medical leave be used for family leave purposes? For example, if you are a parent, can you use it to care for a child or go on medical leave?**

Banked medical leave under statutory provisions (AS 39.20.256) can only be used for the employee's own qualifying medical condition. Statutory banked medical leave cannot be used for parental leave or to take care of a sick family member.

Banked medical leave created by collective bargaining agreement is subject to the specific terms of the agreement. (See appropriate bargaining unit agreements for applicable terms.)

- 27. Can donated leave be used for family leave purposes?**

Yes. AS 39.20.245(b) provides that personal or annual leave may be donated to another employee "only for use as leave for medical reasons." AS 39.20.225(b) provides the following medical reasons for taking medical leave:

- 1) medical disability of the employee
- 2) medical disability of a member of the employee's immediate family that requires the employee's attendance
- 3) a medical condition that makes the employee's attendance a danger
- 4) pregnancy and childbirth or the placement of a child (other than the employee's stepchild) for adoption
- 5) death of a member of the employee's immediate family

Reasons 1-4 above are covered by family leave. Donated leave may be used for family leave taken for any of these reasons. Reason 5 above is not a family leave qualifying condition.

- 28. If the employee has exhausted his/her entitlements under both FMLA and AFLA and is still unable to work, how much more leave either paid or approved LWOP is the employee entitled to?**

If an employee still has paid leave available and is unable to work due to continuing medical reasons, the employee is entitled to use the leave in accordance with the rules that applied before either law became effective. Generally, that means the employee is entitled to paid leave whether business permits or not.

If/when the employee has no paid leave available, the State faces the same choices it had before either law became effective. The basic choice is between authorized leave without pay in accordance with 2 AAC 07.500(2) or similar provision of collective bargaining agreements, and separation of the employee. The employee's use of FMLA/AFLA leave cannot be used against the employee in making this choice. Factors that can be considered include the on-going workload, a backlog, expected additional duration of the period of incapacity, the ease or difficulty of a replacement hire, training time and cost of a replacement hire, etc.

**SECTION I. BASIC FAMILY LEAVE INFORMATION**

- 29. Will leave without pay used under this section advance the employee's merit and leave anniversary dates?**

Yes. The merit and leave anniversary dates are advanced one month for every 23 days of leave without pay accumulated in the leave year (December 16 to December 15).

2AAC 07.360(f)      2 AAC 08.100

- 30. Can health/basic life insurance premiums be recovered from a terminated employee while they are on family leave?**

Yes. The State may determine in some cases, however, that the costs of attempting to recover the premiums outweigh the benefits of recovering them.

29 C.F.R. 825.213

- 31. Is it the intent of the acts that voluntary benefits - e.g., life insurance, free parking, cafeteria privileges, and education expenses - be provided to employees on family leave?**

FMLA: No. Employees are only entitled to receive (and pay for their portion of) employer-sponsored group health benefits during FMLA leave.

AFLA: The State has chosen to pay the employer portion of health insurance during the first twelve weeks of AFLA leave for those employees who are excluded from FMLA coverage regardless of the employee's pay status.

- 32. Can an agency require an employee to take alternative employment rather than grant a family leave request?**

A qualified "yes." An agency cannot deny a request for family leave from a qualified employee. However, an agency can require the employee to take an alternative position under certain specific circumstances and conditions. When an employee wishes to take leave intermittently or on a reduced leave schedule for planned medical treatment, an agency can require that the employee take a temporary transfer to an available alternative position. However, the agency must ensure:

- a. The employee is qualified for the position;
- b. The temporary position offers equivalent pay and benefits; and,
- c. The temporary position is better suited to accommodating recurring periods of leave than the employee's regular position.

29 C.F.R. 825.204



**SECTION I. BASIC FAMILY LEAVE INFORMATION**

- 33. Is the family leave entitlement affected or tracked differently if the employee is on workers' compensation?**

No. Wage continuation/leave adjustments provided by workers' compensation do not affect the duration of the entitlement. The absence is tracked from the onset of a family leave qualifying condition regardless of workers' compensation adjustments.

29 C.F.R. 825.207(2), 210(f)

- 34. Can an employee utilize their accrued leave for purposes other than family leave during intermittent use of family leave?**

Yes. For example, an employee taking family leave intermittently for the employee's own serious health condition could use leave to stay home with a child with a cold, return to work, and then continue to use family leave for the qualifying condition. The short absence to care for the child without a serious health condition would not be counted as part of the employee's family leave entitlement.

- 35. Is it true that an employee's family leave entitlement is not extended when different and unrelated qualifying conditions occur during the original entitlement period?**

Yes. Once an employee begins a family leave absence, the length of the absence(s) and the period in which it (they) may occur is not altered because of any other subsequent and unrelated qualifying conditions that may occur.

Under AFLA, however, an employee may qualify for both medical and parental leave during an overlapping period. AFLA leave for each purpose may run concurrently, e.g., parental leave and caring for a spouse's serious health condition simultaneously.

AS 23.10.500

29C.F.R. 825.110

**SECTION I. BASIC FAMILY LEAVE INFORMATION**

- 36. Are there circumstances that require two related employees, if they are both employed by the State of Alaska, to use an entitlement jointly? Does this apply under both the federal and the state family leave provisions?**

FMLA: Yes. Under FMLA spouses share the 12-week entitlement when the leave is for birth, or placement for adoption or foster care. Similarly, spouses must share the 12-week entitlement to care for a serious health condition of their respective parents.

The employees are jointly entitled to a total of twelve weeks. They may divide the time between them as they wish (half and half, seven weeks and 5 weeks, etc.) The employees may even take the leave concurrently, with approval.

AFLA: No. Under AFLA, if a parent of two related employees (siblings, stepsiblings, or spouses - parent/parent-in-law) or child of two related employees (spouses) has a serious health condition, each employee is entitled to 18 weeks, but may take the time concurrently only if approved by the State. Such approval occurs when separate divisions or departments each approve AFLA leave without regard to the other employee's request to the other division or department.

Departments will be aware of related employees in the department through the nepotism approval process required by 2 AAC 07.950(c).

AS 23.10.500(b), (c)

29 C.F.R. 825.202

See Table 1



**SECTION II. MEDICAL LEAVE FOR EMPLOYEE/FAMILY CARE**

- 1. Must the 12- or 18-week entitlement of leave for employee/family care be taken consecutively?**

No. When medically necessary, the 12- or 18-week entitlement can be taken intermittently or on a reduced leave schedule.

29 C.F.R. 825.203(a), (c)

- 2. Can the weeks be divided into days? Hours?**

Yes. The leave may be divided into the smallest increment the State uses in reporting leave, which is one-quarter hour increments.

29 C.F.R. 825.203(d)

- 3. Is the 12- or 18-week entitlement for medical leave available per incident?**

No. The employee is entitled to medical leave for self and qualifying family members, but the total medical leave taken may not exceed the respective 12- and 18-week limits. After these entitlements are exhausted, other State leave provisions continue to apply. Thus, if the employee still has balances in their sick leave, annual leave, personal leave, excess sick leave, or donated leave accounts, the employee may use paid leave subject to the normal request and approval process. Or, the employee may request and the department may grant an unpaid leave of absence under 2 AAC 07.500(2) or applicable provision of a collective bargaining agreement.

29 C.F.R. 825.200

AS 23.10.500

- 4. What is a "serious health condition?"**

FMLA: A serious health condition is defined as an illness, injury, impairment, or physical or mental condition that involves:

(1) inpatient care in a hospital, hospice or residential medical care facility, including any period of incapacity, or any subsequent treatment in connection with such inpatient care; or

(2) continuing treatment by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

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- (i) A period of incapacity of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
  - (A) 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 under order of, or on referral by, a health care provider; or
  - (B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of a health care provider.
- (ii) Any period of incapacity due to pregnancy, or for prenatal care.
- (iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:
  - (A) Requires periodic visits for treatment by a health care provider, or by a nurse or physicians' assistant under direct supervision of a health care provider;
  - (B) Continues over an extended period of time; and
  - (C) May cause episodic rather than a continuing period of incapacity.
- (iv) 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.
- (v) Any period of absence to receive multiple treatments 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, severe arthritis, kidney disease. See 29 CFR 825.800 for the full definition.

Treatment, for purposes of this section, 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. A regimen of continuing treatment includes, for example, a course of prescription medication or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of continuing treatment that includes the taking of over-the-counter medications; such as, aspirin, antihistamines or salves; or bed-rest, drinking



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fluids, exercise and other similar activities that can be initiated without a visit to a health care provider are, by themselves, not sufficient to constitute a regimen of continuing treatment for purposes of family leave.

Conditions for which cosmetic treatments are administered are not "serious health conditions" unless inpatient hospital care is required or unless complications develop. The following conditions though not usually considered "serious health conditions" MAY be considered such if the criteria outlined above is satisfied:

Common Cold	Flu
Ear Infection	Stress
Routine Dental Problems	Nausea
Minor Ulcers	Allergies
Headaches (other than migraine)	Cosmetic Conditions (acne or plastic surgery)

29 C.F.R. 825.114

AFLA: A serious health condition is defined as an illness, injury, impairment, or physical or mental condition that involves:

- (1) inpatient care in a hospital, hospice, or residential health care facility; or
- (2) continuing treatment or continuing supervision by a health care provider.

AS 23.10.550(5)

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5. **When does the 12- or 18-week entitlement begin if the eligible employee takes leave due to illness or the need to care for the employee's ill child, spouse, or parent, returns to work and then finds out the illness requires time off and is a qualifying condition under FMLA/AFLA?**

The 12- or 18-week entitlement begins on the date the employee first took leave to attend the specific condition. To designate leave as medical leave, the State must make that determination and notify the employee. See Question and Answer 16 in Section I.

The State is required to make the determination and provide notice to the employee within two working days of acquiring the knowledge that the leave is being taken for an FMLA/AFLA purpose. Because the State may acquire the information at different times for different circumstances, supervisors must be alert to requests for leave and make the necessary inquiry at the earliest possible time. When the State does not find out that a period of leave was for a qualifying condition until the employee returns to work, that is the point at which inquiry must be made and a determination decided.

There are only two circumstances in which the State may designate leave as family medical leave after the employee returns to work:

- A. Provided the State did not learn the reason for the absence until the employee returned, and the State makes the determination and provides notice within two working days.
- B. A employee on leave for a FMLA/AFLA qualifying reason of which the State is unaware who desires that the leave be counted as medical leave must notify the State of the desire and the FMLA qualifying reasons within two business days of returning to work. If this does not occur, the employee may not subsequently assert FMLA protections for the absence. Such circumstances might be the desire of the employee to charge the leave against a sick leave account or to avoid the leave being recorded as unauthorized leave without pay.

29 C.F.R. 825.110(d), 301(b)

6. **What is meant by "needed to care for" a family member?**

"Needed to care for" a family member may include physical and/or psychological care when, because of a serious health condition, the family member is unable to care for his/her own basic medical, hygiene, or nutritional needs or safety or is unable to transport him/herself to the doctor, etc. It also includes providing psychological comfort and reassurance that would benefit a qualifying family member with a serious health condition. It also includes needing to fill in for others who are providing the care or to make arrangements for changes in the person's care. If only the need to provide psychological comfort has been indicated on the Certification of Health Care Provider, it may satisfy the "needed to care for" provision.



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It is important to differentiate between being needed to care for the family member and simply wanting to be present to visit with an ill family member. A certification by a health care provider must indicate the family member has a serious health condition. In addition, it must state the family member requires assistance with basic medical or personal needs, safety or transportation, or that the employee is needed to provide psychological comfort or to assist with recovery.

29 C.F.R. 825.116

**7. Must the employee certify the need to take medical leave for self care or the care of a qualifying family member?**

Yes. In all cases where a medical leave entitlement is invoked for more than three consecutive working days for a serious health condition, the State has chosen to require the Certification of Health Care Provider, unless the department head is otherwise satisfied that the leave is for medical reasons.

29 C.F.R. 825.305

AS 39.20.225(3)

**8. What should a health care provider's certification include?**

The health care provider should complete the appropriate Certification of Health Care Provider form or must provide identical information to that required on the forms. In all instances, the information on the form must relate only to the serious health condition for which the current need for leave exists. Copies of the form for an employee's own serious health condition and the form for a family member's serious health condition are included as Attachments A and B.

Information to be provided includes:

**1. Name of the Health Care Provider and type of practice.**

A certification as to which part of the definition of "serious health condition" applies to the patient's condition and the medical facts to support the certification, including a brief statement as to how the medical facts meet the criteria.

**2. The approximate date the serious health condition commenced and it's probable duration.**

Whether it will be necessary for the employee to take leave intermittently or to work on a reduced schedule and the probable duration of such a schedule.

If the condition is pregnancy or a chronic condition, whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity.

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3. If additional treatments will be required, an estimate of the probable number of such treatments.

If the incapacity will be intermittent, or will require a reduced leave schedule, an estimate of the probable number and interval between such treatments, actual or estimated dates of treatment, if known, and period required for recovery.

If any of the treatments will be provided by another health care provider, the nature of the treatments.

If a regimen of treatment is required, the nature of the regimen.

4. If medical leave is required because of the employee's serious health condition, whether the employee:

Is unable to perform work of any kind,

Is unable to perform any one or more of the essential functions of the employee's position, including a statement of the essential function the employee is unable to perform, or

Must be absent for treatment.

5. If leave is required to care for a family member

Whether the patient requires assistance for basic medical or personal needs or safety, or for transportation; or, if not, whether the employee's presence to provide psychological comfort would be beneficial to the patient to assist in the patient's recovery. The employee is required to indicate the care he or she will provide and an estimate of the time period.

If the employee's family member will need care only intermittently or on a reduced leave schedule and the probable duration of the leave. See Table 1 for definitions.

29 C.F.R. 825.306

9. **If the employee does not provide the information on the Certification of Health Care Provider, can the employee be directed to return to work?**

If the employee fails to provide certification within a reasonable time, the employer may delay the continuance of FMLA. If the employee never provides the required certification, the leave is not FMLA leave. See Question and Answer 21 in Section I.

29 C.F.R. 825.311



**SECTION II. MEDICAL LEAVE FOR EMPLOYEE/FAMILY CARE**

**10. What is meant by "incapacity?"**

For purposes of FMLA, "incapacity" is defined to mean the inability to work, attend school or perform other regular daily activities due to the serious health condition, therefore, or recovery therefrom.

29 C.F.R. 825.114(a)(2)(i)

**11. Can the State require a second medical opinion?**

Yes, under FMLA the State may require the employee to obtain a second medical opinion under the following provisions:

- the health care provider is designated or approved by the State;
- the health care provider is not employed by the State on a regular basis;
- the State pays all expenses of a second opinion.

The second criterion need not be met for an employee qualifying only under AFLA.

29 C.F.R. 825.307

**12. Can the State require a third medical opinion?**

Yes, under FMLA, if the first and second opinions are in conflict, a third and controlling opinion can be required under the following provisions:

- the health care provider is jointly approved by the State and the employee;
- the State pays all expenses of a third opinion.

The third opinion is not necessarily controlling and the first criterion need not be met for an employee qualifying only under AFLA.

29 C.F.R. 825.307

**13. Is leave for treatment of substance abuse - e.g. alcohol and drug abuse - covered by medical leave?**

Yes, absences for treatment of substance abuse may qualify provided that the employee is receiving inpatient care or outpatient care on a continuing basis and so long as the other terms of the FMLA or AFLA are met. Absences because of an employee's use of the substance, rather than for treatment, does not qualify for medical leave.

29 C.F.R. 825.114(d)

**SECTION II. MEDICAL LEAVE FOR EMPLOYEE/FAMILY CARE**

- 14. If an employee suffering from alcoholism is no longer in a treatment program or under medical care, how soon can an agency order the employee back to work?**

When the treatment program and any associated period of incapacity ends, the medical leave ends. At that point an agency can require that an employee report back to work as soon as the employee's health care provider certifies that the employee is fit for duty.

29 C.F.R. 825.114(d)

- 15. When can the State require a fit-for-duty statement before an employee returns to work?**

Under FMLA, the State may require a fit-for-duty report under a uniformly-applied policy or practice that requires all similarly-situated employees who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work. This limitation excludes fit-for-duty reports for parental leave and for medical leave for the serious health condition of the employee's parent, spouse, or child. FMLA also prohibits an employer from requiring a fit-for-duty report when the employee takes intermittent leave. Presumably, the conditions for both taking and returning from intermittent leave will be covered in the Certification of Health Care Provider when the leave is requested.

It is the State's policy to require a fit-for-duty report in the following circumstances:

- 1) where the capacity or incapacity from a serious health condition would not be apparent to a health layperson,
- 2) where the relationship between the medical facts that support the certification of a serious health condition and the demands of an employee's position would not be apparent to a health layperson.

Examples under 1) include any mental, psychological, or emotional conditions that have incapacitated an employee, and any contagious diseases. Examples under 2) include back injuries for positions requiring lifting, and heart disease for positions that require physical exertion.

The need for a fit-for-duty report must be decided at the same time a determination is made of whether leave will be FMLA leave. See Question and Answer 16 in Section I, and Question and Answer 6 in this Section. The employee must be notified of the requirement at the same time as other pertinent information is conveyed about the determination. Based on the employee's request and the Certification of Health Care Provider, a supervisor should ask the question: "Will I know when the employee is fit to return to duty?" An answer of "No" means the employee is to be notified that a fit-for-duty report will be required.

29 C.F.R. 825.310



**SECTION III. PARENTAL LEAVE****1. Must the 12- or 18-week leave entitlement be taken consecutively?**

FMLA: A qualified yes. A qualified employee is entitled to 12 weeks of leave for medical and parental leave combined. Most pre-labor/delivery/recovery pregnancy related absences (prenatal care, severe morning sickness, medically ordered bed rest, etc.) are treated as medical leave. Delivery and recovery therefore is a period of incapacity and is also medical leave. Any remaining portion of the 12 week entitlement, after both pregnancy and non-pregnancy medical leave during the FMLA leave year, may be taken as parental leave. The parental leave period must be taken consecutively beginning with the first usage after recovery from delivery. For the mother, parental leave is most frequently taken immediately, however a female employee may choose otherwise. For the father, upon certification of the need to attend to the serious health condition of the spouse, an employee may take medical leave. Upon the birth, the father is entitled to any remaining portion of the 12 weeks of family leave as parental leave. The State has chosen to require this leave to be taken consecutively. For both the father and the mother, once the eligible employee begins parental leave the end date for any remaining portion of the family leave is established.

AFLA: Pregnancy and childbirth creates a separate 18 week entitlement for parental leave for eligible employees. Pre-labor/delivery/recovery pregnancy related leave is covered by the entitlement. Leave for these purposes can be taken intermittently, on a reduced schedule, or in blocks of time as appropriate for the individual circumstance. For example, routine prenatal doctor visits would be taken intermittently, severe morning sickness might require a reduced schedule, and medically ordered bed rest would require use of a block of time. The State has chosen to require that any remaining entitlement following delivery and recovery therefrom be taken in a single block of time. The leave begins when first used for this purpose and ends when the entitlement is exhausted or one year after birth, whichever occurs first.

29 C.F.R. 825.200 AS 23.10.500(b)(1)

For both FMLA and AFLA, the threshold question of when parental leave begins that must be taken in a single block of time is, "When is the mother no longer incapacitated from the delivery?" "Incapacity" for this purpose means the inability to work, attend school, or perform other regular daily activities. Any question regarding when a mother is no longer incapacitated should be resolved through the use of the appropriate Certification of Health Care Provider. For example, a new father requesting leave for more than three consecutive work days may be asked to complete a certificate to determine if leave usage starts the single block of time period based on the capacity/incapacity of the spouse.

2 AAC 08.050(b)

**SECTION III. PARENTAL LEAVE**

- 2. Under AFLA, must the employee meet the employment threshold at the time of birth? If the employee later satisfies the threshold prior to the child's first birthday, are they entitled to the full eighteen weeks?**

The employee is not required to satisfy the employment threshold at the time of the birth of the child; however, the leave must be concluded within one year of the birth. Once the threshold is met, the employee is entitled to take as much time, up to the full eighteen weeks, as remains prior to the child's first birthday. The leave must be taken in a single block of time.

- 3. How is the parental leave entitlement for part-time employees determined?**

If an employee normally works a 25 hour work week, then 25 hours equals one week for purposes of parental leave. There is no difference between a part-time employee and a full-time employee in this regard for leave taken in consecutive blocks.

- 4. Many state employees work a week-on-week-off schedule. In some cases, employees work a two-week-on-two-week-off schedule. How is the leave entitlement calculated for these employees?**

The parental leave entitlement is determined by calendar weeks regardless of work schedule. As an example, an employee working a week-on-week-off schedule would be entitled to 12 and/or 18 calendar weeks of parental leave; not 24 or 36 weeks. The reasoning is based on an "average" work week.

When an employee works a week-on-week-off schedule, the hours worked during the week-on are averaged over the two week period. When leave is taken the "off" week is counted as one of the average work weeks to which the employee is entitled.

- 5. Are the 12- or 18-weeks of leave extended for part-time employees or other employees who work a reduced workweek?**

No. These employees are entitled to 12- or 18-consecutive weeks.

- 6. Can the employee schedule the 12- or 18-consecutive weeks of parental leave any time up to 12 months after the event?**

Yes. See Question and Answer 2 in this section for parental leave taken before recovery from delivery. Any remaining parental leave may be taken any time within 12 months of the event. Further, the single block of leave period begins when leave is first used following the qualifying reason.



**SECTION III. PARENTAL LEAVE**

7. **If a pregnant employee takes medical leave due to a serious health condition, unrelated to the pregnancy, is the employee entitled to an additional 12- or 18-consecutive weeks of parental leave after the birth of the child?**

FMLA: An employee is entitled to 12 weeks for any combination of medical and parental leave.

Thus the employee in question would be entitled to only the remaining FMLA family leave as a single block of parental leave after the birth of the child.

AFLA: The employee is entitled to 18 weeks of leave in a 24 month period due to a serious health condition and a separate entitlement of 18 weeks within a twelve month period due to pregnancy and childbirth.

When the leave is counted as both FMLA and AFLA leave, the leave is concurrently counted against each entitlement.

AS 23.10.500(b)

8. **If the employee's serious health condition (unrelated to pregnancy) extends beyond the date of birth, do the 18-consecutive weeks of parental leave automatically start when the child is born?**

Not necessarily. The parental leave starts when the employee first takes leave for this purpose, and is exhausted one year after the birth. Supervisors must make sufficient inquiry to determine the purpose of an employee's leave request and properly designate it for the serious health condition (medical leave) or for care or bonding with the newborn (parental leave). Once the parental leave starts (after delivery and recovery therefrom), it is available only in a single consecutive block of time.

9. **If the employee is ordered, by a health care provider, to full or partial bed rest due to a pregnancy related condition, does this begin the parental leave entitlement under this section?**

FMLA: Any period of incapacity due to pregnancy (as long as the employee is under the continuing treatment of a health care provider) is a serious health condition and entitles a qualified employee to use medical leave. The entitlement under FMLA is 12 weeks in a 12-month period for medical and parental leave combined. Once parental leave is used after recovery from delivery, any remaining portion of the 12-week entitlement must be taken as a single block of time.

AFLA: "Pregnancy and the birth of a child" entitles a qualified employee to take 18 weeks of leave under AFLA. The State has chosen to allow parental leave taken before recovery from delivery to be taken intermittently, on a reduced work schedule, or in blocks of time as appropriate to the individual circumstance. Bed rest ordered by a physician is an example of parental leave to be taken in a block of time. The State has chosen to require parental leave following recovery from delivery to be taken in a single block of time for the remaining balance of the entitlement.

**SECTION III. PARENTAL LEAVE**

- 10. If the employee elects to take leave to prepare for the birth of a child, does the 12- or 18-consecutive week entitlement begin at that time?**

FMLA: Periods of incapacity due to pregnancy, and prenatal care (under the continuing treatment of a health care provider) are serious health conditions which entitle a qualified employee to medical leave. Childbirth entitles a qualified employee to parental leave. Other elective leave is not FMLA qualifying. The single block of time provisions apply after recovery from delivery and begins the first time the employee requests leave for this purpose.

AFLA: Preparation for the birth of a child is parental leave under AFLA. Parental leave before delivery may be taken intermittently, on a reduced schedule, or in blocks of time as appropriate to the individual circumstance and is charged against the 18 week entitlement (see Question and Answer 2 above). Parental leave after delivery and recovery must be taken in a single block of time. It begins when leave is first used for this purpose and ends when the balance of the 18 week entitlement would be exhausted or one year after the birth.

- 11. Are eligible employees entitled to parental leave for the placement of a foster child under the State act? The Federal act?**

There is no entitlement for foster care placement under the AFLA. FMLA entitles the qualified employee up to 12 weeks of leave for the placement of a foster child. The State has chosen to allow this leave to be taken intermittently before placement but require this leave to be taken in a single block of time beginning with the first use after placement.

29 C.F.R. 825.112(a)

- 12. Does a foster care placement have to occur through a specific agency?**

Yes. Such placement is made by or with the agreement of the State as a result of either a voluntary agreement between the parent or guardian that the child be removed from the home, or as the result of a judicial determination of the necessity for foster care, and involves agreement between the State and foster family that the foster family will take care of the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody. The State involvement will distinguish foster care from some in loco parentis situations.

29 C.F.R. 825.112(e)



**SECTION III. PARENTAL LEAVE**

- 13. Is the employee entitled to a total of 12- or 18-weeks in a 12 month period for each birth, adoption, or placement of a foster child?**

No. The employee is only entitled to a total of 12 or 18 weeks of leave in a 12 month period regardless of number of births, adoptions, placements (FMLA only), etc. However, the requirement to use this leave within a year after an event may result in full entitlements in successive 12 month periods based on multiple events in a single 12 month period. For example, a child is placed with a qualified full time employee for adoption at the time the employee has been pregnant for one month. The employee may take the 18-week entitlement for the adoption immediately (about four months), return to work for four months until the child is born, then wait four more months until the second 12 month period begins to take another 18 week period of leave.

- 14. Is treatment of fertility problems covered under the act? Is miscarriage?**

Treatment of fertility problems is not covered. Miscarriage is a serious health condition if certified as such by a health care provider.

- 15. If two unrelated employees in the same division request parental leave at the same or overlapping periods of time, can the employer choose not to grant parental leave simultaneously?**

No. The employees should make reasonable efforts to schedule parental leave so as not to unduly disrupt the employer's operations. However, if a satisfactory arrangement cannot be reached, the employer must allow both employees off at the same time.

- 16. AS 39.20.305 appears to give agencies the authority to determine whether an employee is required to take consecutive or intermittent leave for pregnancy and childbirth purposes. Is this different than the Department of Administration policy? If so, why?**

The State's policy is that departments and agencies will require that parental leave taken following recovery from the birth of a child, or following the placement of a child, other than the employee's stepchild, with an employee for adoption be taken consecutively. Parental leave may be taken before these thresholds in other forms. For example, routine prenatal care or meetings with attorneys or adoption agencies may be taken intermittently. The purpose of this policy is to simplify overall administration of the State and federal leave entitlements. This policy was developed by a subcommittee of the Human Resources Managers, and revised following review by the FMLA Committee, Human Resources Managers and division staff. The Leave Rules (2 AAC 08) have been amended to incorporate this policy. This memorandum provides further interpretation of the rules by the Director of Personnel.

**SECTION IV. ACCOMMODATIONS FOR PREGNANT EMPLOYEES**

1. **If the employee requests lighter duty for the duration of a pregnancy, can the department keep the employee in the same PCN if the physical needs can be accommodated?**

Yes. The employer may require certification by a health care provider prior to making the requested accommodation.

AS 23.10.520

2. **If the employee requests a transfer within the agency to another position, in the same job class or to a closely related job class at the same pay range, due to pregnancy, can the employer make the transfer without recruiting through Workplace Alaska?**

Yes. A transfer of a pregnant employee under AFLA has priority over a laid off employee or an injured worker. Once a "suitable" position has been identified in response to a pregnant employee's request, an appointment of any other candidate to the position may not be made until the pregnant employee has been offered the position and refused the offer.

AS 23.10.520            2 AAC 07.170(a)

3. **Upon returning from parental leave, is the employee transferred to the original position that was held prior to the transfer for accommodation?**

The returning employee is placed in the position that was held immediately prior to commencing parental leave.

AS 23.10.520            29 C.F.R. 825.214

4. **What if the employee's position no longer has the same duties, responsibilities, title, pay, benefits, shifts, etc., when the employee returns from parental leave?**

Structured reorganization for any business related reason can occur. However, it is not a good management practice to permit supervisors/managers to make changes of this nature to a position if the incumbent is on parental leave. There is the chance this could be construed as punitive action against the employee on parental leave.

5. **In which position is the employee placed if the position the employee held prior to commencing family leave no longer exists?**

If the position no longer exists, the employee must be placed in an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.

If there is not an equivalent position available, layoff provisions are invoked *at the time the position is abolished*. The result may be the layoff of the employee on or returning from parental leave (in which case the parental leave rights, including the requirement for continuation of group health insurance, also end) or the layoff of some other employee and the reassignment of the employee on parental leave.

29 C.F.R. 825.214            AS 23.10.500



**SECTION V. NOTICES AND RECORDKEEPING****1. What is reasonable notice to the employer when requesting family leave?**

- 30 days in advance for a foreseeable need based on planned medical treatment or expected birth/placement;
- as soon as the need is known or is practical if the 30-day notice cannot be met. This means at least verbal notification within one or two business days in advance of the need except in circumstances beyond the employee's control;
- employees are obligated to make a reasonable effort to schedule treatment so as not to unduly disrupt agency operations. Such scheduling is subject to the approval of the health care provider under both FMLA and AFLA.

**2. When must the employer notify the employee that the leave has been designated as FMLA?**

When the employer knows that the leave qualifies under FMLA, the employer must promptly notify the employee that the leave has been designated as FMLA and will be counted against the employee's FMLA entitlement. This notice must normally be provided within two days. It may be oral or in writing; however, an oral notice must be confirmed in writing no later than the following payday (the 15th or last day of the month), unless the payday is less than one week from the time the oral notice is given. In the event that the oral notice is given less than one week from the following payday, the employer will have until the next payday to provide written notice.

If the employer has knowledge that the leave is FMLA qualifying and does not designate it as such, the employer cannot designate it retroactively, but can only designate it as FMLA from the time the notification is provided to the employee. If the employer learns that the leave is for FMLA purposes after the leave has begun, that portion of the leave which is qualifying may be designated as FMLA.

There are only two situations in which the employer may designate leave as FMLA after the employee has returned to work. If the leave was for a FMLA reason but the employer was not aware of it until the employee returned to work, the employer may designate the leave as FMLA. The designation must be made within two working days of the employee's return and the employee must be appropriately notified. If the employee wishes to have the leave designated as FMLA, the employee must notify the employer of the reason within two days of returning to work.

If the employer knows the reason for the leave but has not been able to confirm that it qualifies for FMLA or all the necessary information has not been received the employer should make a preliminary designation and notify the employee. If the information when received, confirms the FMLA designation, the preliminary designation becomes final. If the information fails to support an FMLA designation, the designation is withdrawn and written notice is provided to the employee.

## SECTION V. NOTICES AND RECORDKEEPING

### 3. What other notice is the employer required to provide to the employee?

The employer shall provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The notice must include, as appropriate:

That the leave will be counted against the employee's annual FMLA leave entitlement;

Any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failure to do so;

The employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution;

Any requirement of the employee to make any premium payments to maintain health benefits and the arrangements for making such payments, and the possible consequences of failure to make such payments on a timely basis;

Any requirement for the employee to present a fitness-for-duty certification to be restored to employment;

The employee's status as a "key employee" and the potential consequences that restoration may be denied following FMLA leave, explaining the reasons for such denial;

The employee's right to restoration to the same or an equivalent job upon return from leave; and

The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave.

The specific notice may include other information, such as whether the employer will require periodic reports of the employee's status and intent to return to work.

The written notice must be provided to the employee no less often than the first time in each six month period that an employee files notice of the need for FMLA leave. The notice shall be given within a reasonable time after notice of the need for leave is given by the employee -- within one to two business days if feasible. If leave has already begun, the notice shall be mailed to the employee's address of record.

If the specific information provided in the notice changes with respect to a subsequent period of FMLA leave during the six month period, the employer shall, within one or two business days of receipt of the employee's notice of need for leave, provide written notice referencing the prior notice and setting forth any of the information which has changed.



**SECTION V. NOTICES AND RECORDKEEPING**

If the employer is requiring medical certification or a "fitness-for-duty" report, written notice of the requirement shall be given with respect to each employee notice of a need for leave. Subsequent written notification shall not be required if the initial notice in the six-month period and the employer handbook or other written documents describing the employer's leave policies, clearly provided that certification or a "fitness-for-duty" report would be required (e.g., by stating that certification would be required in all cases, that certification would be required in all cases in which leave of more than a specified number of days is taken, etc.). When subsequent written notice is not required, at least oral notice should be given.

Employers are expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA.

Employers furnishing FMLA required notices to sensory impaired individuals must also comply with all applicable requirements under federal or state law. If an employer fails to provide notice in accordance with the provisions of this section, the employer may not take action against an employee for failure to comply with any provisions required to be set forth in the notice.

Attachment E provides sample memoranda for State supervisors to use in providing this notice. It reflects decisions made by the State regarding employer choices and provides for designation of remaining alternatives. For example, the decision to require employees to use paid leave is reflected in the memorandum. It also provides space to indicate the requirement for a fit-for-duty report to be completed in accordance with Question and Answer 16 in Section II.

29 C.F.R. 825.301

**4. Must the Certification of Health Care Provider and other medical information about an employee or family member's health condition be kept in files separate from other personnel or payroll files?**

Yes. The Americans with Disabilities Act requires such information to be filed separately.

ADA Title I, 42 U.S.C 12101, C.F.R. 1630.14 b (1)

**5. Is there any required notice that must be posted?**

The FMLA requires that every covered employer post and keep posted on its premises, in conspicuous places where employees are employed, including locations with less than 50 employees in a 75-mile radius, a notice explaining the federal provisions and providing information concerning the procedure for filing complaints of violations of the federal law with the U.S. Department of Labor Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. A master copy of a poster meeting these requirements which also includes information about AFLA has been provided to agency human resources offices for duplication and distribution for posting. A photoreduced copy is Attachment C.

29 C.F.R. 825.300