Frequently Asked Questions Regarding Family Leave;
Federal Regulations; and the Alaska Statutes

Overview of the Acts

The Family and Medical Leave Act of 1993 (FMLA) provides a job-protected absence for up to 12 weeks in a 12-month period to eligible employees for a qualifying condition. The **National Defense Authorization Act (NDAA)** amended the FMLA effective January 16, 2009. Two new leave rights were added relating to military service: entitlement for 12 weeks of leave for eligible employees because of "any qualifying exigency" and an entitlement for up to 26 weeks of leave for eligible employees related to a service member who is recovering from a serious illness or injury sustained in the line of duty on active duty. Other revisions adopted in the final rule adopted by the U.S. Department of Labor made changes to FMLA in the areas of: employer notice obligations, medical certification, nonconsecutive periods of service as it applies to the eligibility threshold, addition of non-designation of FMLA leave penalties, revisions to the definition of serious health condition, changed light duty to *not* count toward a FMLA entitlement, and clarified that an employee can voluntarily settle past FMLA claims without court or departmental approval but prohibits an employee from waiving prospective FMLA rights. On October 28, 2009, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2010 (2010 NDAA), Public Law 111-84. Section 565 of the 2010 NDAA amended the FMLA, expanding the military family leave provisions. This amendment expanded qualifying exigency leave to employees with family members serving in a regular component of the Armed Forces and added inclusion of members of the National Guard and Reserves who were deployed with the Armed Forces to a foreign country. The 2010 NDAA also expanded the military caregiver leave provisions of the FMLA by broadening the definition of "covered servicemember" and amended the FMLA's definition of a "serious injury or illness."

The Alaska Family Leave Act of 1992 (AFLA) provides a job protected absence for up to 18 weeks in a 24-month period to eligible employees for a qualifying serious medical condition. It also provides a job protected absence for up to 18 weeks in a 12-month period to eligible employees for pregnancy, childbirth or adoption.

When an employee is eligible under both Acts, the entitlements run concurrently.

General Information

The federal Family and Medical Leave Act (FMLA) and Alaska Family Leave Act (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 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. Refer to the Alaska Administrative Manual, 280.360 – 280.450. The State of Alaska's decisions are also reflected in the question and answer sections that follow. 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. Although this FAQ addresses some questions, careful review of the full requirements is encouraged (29 CFR Part 825, Subpart C).

Implementation of FMLA and AFLA added material to, and required 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. The Division of Personnel is responsible for maintaining the official medical file.

We have adopted the following convention throughout this document 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 and reflects state policy adopted through the Alaska Administrative Manual.

Section I. Basic Family Leave Information

This section of the FAQs addresses both medical and parental leave under FMLA and AFLA and policies adopted through the Alaska Administrative Manual.

1. What are the employment thresholds to qualify for family leave?

FMLA: The applicable thresholds for FMLA are having worked for the state for at least 12 months. The 12 months service does not need to be continuous; if employee has a 7 year break in service, service that is more than 7 years old does not need counted unless: 1) break was due to National Guard or Reserve military service or b) written agreement exists regarding employer's intention to rehire employee after the break in service. The threshold includes 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 (i.e., persons employed by the state covered by a collective bargaining unit agreement, etc., 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 (exempt, partially exempt, excluded not listed in AS 39.20.310 as an exemption), 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.

POLICY: The State of Alaska has adopted a more generous policy that allows employees who meet the employment and hours worked thresholds to be eligible for family leave regardless of the number of employees within a given radius.

29 CFR 825.110 AS 39.20.500(b) AAM 280.370

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 1,250-hour service requirement.

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. 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.

29 CFR 825.110(c) AS 39.20.500

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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 at least 1,250 hours in the preceding year) and could take 12 weeks of leave, with insurance coverage, for a qualifying condition.

POLICY: Health insurance for the first twelve weeks of AFLA leave is provided to those employees who are excluded from FMLA coverage who are eligible and qualified for AFLA and meet the 1,250-hour employment threshold requirement.

29 CFR 825.110 AAM 280.420

4. Would an employee who was employed for 30 hours a week for eight months be covered under AFLA because the <u>total</u> 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 39.20.500(b)

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

The Division of Personnel & Labor Relations is responsible for making the final determination.

AAM 280.370

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.

29 CFR 825.110 AS 39.20.500

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 exclusions under AFLA (see AS 39.20.310).

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29 CFR 825.800 AS 39.20.500 AS 39.20.310

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 months prior to the beginning of the leave period is used for calculating the employee's normal workweek.

29 CFR 825.205

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 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.

The Division of Personnel is responsible for tracking 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 CFR 825.200(f) 29 CFR 825.205(a)

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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 CFR 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.

29 CFR 825.112(f) AS 39.20.500(d)

12. Seasonal leave without pay makes it difficult for seasonal employees to meet the employment threshold requirements for FMLA and AFLA. 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 as well, 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: Coverage is only maintained for eligible employees while in pay status. The employee pays cost of maintaining coverage in period of leave without pay.

POLICY: 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. This applies to those employee such as policy level exempt and partially exempt employees providing the employee has been employed by the state for a 12-month period and worked 1,250 hours during the previous 12-month period and is otherwise qualified for health insurance.

29 CFR 825.209 AS 39.20.500(d) AAM 280.420

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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. 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.

AS 39.20.305
See applicable collective bargaining unit agreements

15. Once an employee has elected to retain accumulated leave for an AS 39.20.305 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 39.20.305 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.

AS 39.20.305

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 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 to document the employee's need for medical leave that exceeds three consecutive workdays.

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

29 CFR 825.302 AS 39.20.510 AS 39.20.305(b)

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 the Division of Personnel 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.

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.

Supervisors or the supervisor's designee conditionally invokes the employee's absence as family leave within two working days of acquiring knowledge of a possible family leave qualifying condition. The Division of Personnel officially designates an employee's absence as family leave.

29 CFR 825.208 AAM 280.370

18. Can the employer designate FMLA leave retroactively?

If the Division of Personnel & Labor Relations does not designate leave as required by 29 CRF 825.300, the Division of Personnel & Labor Relations may retroactively designate leave as FMLA leave with appropriate notice to the employee in accordance with the notice provisions provided that the employer's failure to timely designate leave does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, an employee and an employer can mutually agree that leave be retroactively designated as FMLA leave.

29 CFR 825.301

19. Can an employer be liable for not designating FMLA qualifying leave?

If the employer's failure to timely designate leave in accordance with 29 CFR 825.300 causes the employee to suffer harm, it may constitute an interference with, restraint of, or denial of the exercise of an employee's FMLA rights. The employer might be liable for not designating FMLA qualifying leave if the employee can demonstrate he or she suffered actual harm.

29 CFR 825.301

20. 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.

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POLICY: It is the policy of the state that the definition of health care provider utilized under FMLA, will be the same definition utilized for the portion of the absence associated with AFLA as long as the employee is eligible.

29 CFR 825.118 AAM 280.380

21. 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 CFR 825.200(b) AAM 280.390

22. How much family leave is a 37.5-hour week full-time 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.

29 CFR 825.100 AS 39.20.500 AS 39.20.305

23. 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 and Workforce Development makes eligibility determinations.

AS 23.20.378-.379

24. 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 (CHCP) 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 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 11 and 12 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).

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

29 CFR 825.307(2) 29 CFR 825.308(a)(2) 29 CFR 825.311(b)
See applicable collective bargaining unit agreements

25. Does the supervisor have the right to question the nature of 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 (CHCP). In addition, the state has chosen to require a CHCP whenever medical leave is used for more than three consecutive workdays.

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 11 and 12 in Section II.

29 CFR 825.302(c) 29 CFR 825.307(a)
See applicable collective bargaining unit agreements

26. If an employee is using what appears to be an excessive amount of leave for sick purposes, should the supervisor or the Division of Personnel & Labor Relations 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 conditionally invoked by the agency.

29 CFR 825.208(a)

27. 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 prospective (future) qualifying conditions if the employee otherwise qualifies for family leave. An employee can voluntarily settle past FMLA claims without court or departmental approval. An employee’s waiver of prospective FMLA rights is prohibited.

29 CFR 825.208 AAM 280.370

28. 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 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.

AS 39.20.256
See applicable collective bargaining unit agreement

29. 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.

As 39.25.245(b)
See applicable collective bargaining unit agreements

30. 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.

AS 39.20.320 2 AAC 07.500(2)
See applicable collective bargaining unit agreements

31. 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(g) 2 AAC 08.100
See applicable collective bargaining unit agreements

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

Yes. The recovery of health insurance and basic life insurance premiums paid during an employee's unpaid family leave absence will be pursued if the employees fails to return to duty upon conclusion of family leave eligibility unless the employee does not return to duty due to: continuation, recurrence, or onset of a documented serious health condition which would again qualify for family leave; or other circumstances beyond their control. An employee who returns to work for at least 30 calendar days is considered to have "returned" to work. An employee who transfers directly from taking FMLA leave to retirement, or who retires during the first 30 days after the employee returns to work, is deemed to have returned to work.

29 CFR 825.213 AAM 280.420

33. 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: No. The premiums to cover voluntary options currently selected are only covered through deductions from the employee's payroll warrant. If all paid leave is exhausted, coverage will end on the last day of the month in which a payroll deduction was last able to process.

29 CFR 825.210 AS 39.20.500(d)

34. 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 CFR 825.204

35. Is the family leave entitlement affected or tracked differently if the employee chooses freely to perform light duty work?

A light duty assignment which complies with the necessary restrictions and accommodations imposed by the employee's qualifying health care provider ***does not*** count toward the duration of the FMLA entitlement. Light duty is defined as a temporary modification or elimination of one or more of the

essential function(s) of a position and is considered to be an absence from regular duties. An employee must not be coerced to accept a light duty assignment. Acceptance of a light duty assignment by an employee is voluntary. Light duty assignments are at the sole discretion of the appointing authority. When assigned to light duty, an employee's PCN and job classification remain the same, they are simply assigned to work in a reduced capacity.

29 CFR 825.220(d) AAM 280.400

36. 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 CFR 825.207(2) 29 CFR 825.210(f) AAM 280.390

37. 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.

AS 39.20.225
See applicable collective bargaining unit agreement

38. 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.

29CFR 825.110 AS 39.20.500

39. 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.

Section I. Basic Family Leave Information

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 with approval.

POLICY: The state policy is more generous. Under FMLA, the entitlements are not shared. Under AFLA, concurrent use of leave exclusively by a husband, wife or sibling working within the same department or agency for the serious health condition of a child or parent is at the sole discretion of the department head.

29 CFR 825.202 AS 39.20.500(b), (c) AAM 280.390

Section II. Medical Leave for Employee/Family Care

This section of the FAQs applies only to medical leave under FMLA and AFLA and policies adopted through the Alaska Administrative Manual.

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 CFR 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: one-quarter (.25) hour increments.

29 CFR 825.203(d) AAM 280.390

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 CFR 825.200 AS 39.20.500 2 AAC 07.500(2)
See applicable collective bargaining agreements

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:

(A) **Hospital inpatient case.** Overnight 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

(B) **Absence plus Continuing Treatment.** A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

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: 1) Treatment two or more times within 30 days of the first day of incapacity 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 2) Two visits for treatment by a health care provider that results in a regimen of continuing treatment under the supervision of a health care provider.

(C) **Pregnancy/Prenatal Care.** Any period of incapacity due to pregnancy or prenatal care.

(D) **Chronic Conditions.** Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which: 1)

Requires at least two visits annually for treatment by a health care provider, or by a nurse or physicians' assistant under direct supervision of a health care provider; 2) Continues over an extended period of time including reoccurring episodes of a significant underlying condition; and 3) May cause episodic rather than a continuing period of incapacity, i.e., asthma, diabetes, epilepsy.

(E) **Permanent/Long Term Conditions.** A period of incapacity that 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, i.e., stroke.

(F) **Multiple Treatments for a Non-Chronic Condition.** 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 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 CFR 825.114 29 CFR 825.113

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

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

AS 39.20.550(5)

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 supervisor is required to make the conditional 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. All attempts will be made to acquire the necessary information to make a conditional determination at the immediate onset of family leave usage; however, the employer is not prohibited from retroactively applying family leave entitlements and protections to previous, qualifying absences.

29 CFR 825.110(b), (d) 29 CFR 825.208 AAM 280.370, .390

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.

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 CFR 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.

29 CFR 825.305

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.

Section II. Medical Leave for Employee/Family Care

The state has adopted a single form to use for an employee's own serious health condition or a family member's serious health condition that includes:

(A) 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.

(B) The approximate date the serious health condition commenced and its 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.

(C) 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.

(D) 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.

(E) 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 CFR 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 22 in Section I.

29 CFR 825.311

10. Can the State contact the employee's Health Care Provider to clarify and verify the Certification for Health Care Provider form?

The 2009 revision to FMLA allows this contact. The State requires supervisors to work through the Division of Personnel & Labor Relations on any such contact.

29 CFR 25.305 29 CFR 25.306

11. 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 there from.

29 CFR 825.114(a)(2)(i)

12. 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; and
- the state pays all expenses of a second opinion.

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

29 CFR 825.307

13. 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 CFR 825.307

14. Is leave for treatment of substance abuse (e.g. alcohol and drug abuse) covered by medical leave? Can the employer take disciplinary action if substance abuse/use occurred on the job or is in nexus to the job if an employee has an approved absence for treatment for substance abuse?

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. Further, the employer maintains the right to take disciplinary action if substance abuse/use occurred on the job or is in nexus to the job.

29 CFR 825.114(d) AAM 280.450

15. 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 end, 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 CFR 825.114(d)

16. When can the state require a fit-for-duty statement before an employee returns to work?

FMLA: 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.

POLICY: It is the state's policy to require a fit-for-duty statement under the following circumstances:

- When the incapacity from a serious health condition would not be apparent to a layperson such as mental, psychological, or emotional conditions that have incapacitated an employee, or any contagious diseases.
- When the relationship between medical facts that support certification of a serious health condition and the demands of an employee’s position would not be apparent to a layperson such as back injuries for positions requiring lifting or heart disease for positions that require physical exertion.

With the exception of vessel employees of the Alaska Marine Highway System and other situations where collective bargaining agreements provide otherwise, a fit-for-duty statement is not required for an employee who is absent on intermittent leave.

The need for a fit-for-duty report must be decided at the same time a final determination is made by the Division of Personnel of whether leave will be FMLA leave. The employee must be notified of the requirement at the same time as other pertinent information is conveyed about the determination. The employer will delay the restoration to the employee without such fit-for-duty statement.

29 CFR 825.310 AAM 280.440
See applicable collective bargaining unit agreements

Section III. Parental Leave

This section of the FAQs applies only to parental leave under FMLA and AFLA and policies adopted through the Alaska Administrative Manual.

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, childbirth and bonding 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.

29 CFR 825.200, .201 AS 39.20.305 AS 39.20.500(b)(1) AAM 280.430

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)

POLICY: The state has chosen to require that any remaining entitlement following delivery and recovery there from 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. The leave is not extended as a result of intermittent leave or a reduced schedule following placement or recovery from birth.

AAM 280.430

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 or placement. Once an eligible

employee meets the employment threshold, the employee is entitled to take as much time, up to the full eighteen weeks, as remains prior to the conclusion of the 12-month period. The leave must be taken in a single block of time.

2 AAC 08.050(b)

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

If an employee normally works a 25-hour workweek, 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.

29 CFR 825.205

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" workweek.

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 workweeks to which the employee is entitled.

29 CFR 825.205

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.

29 CFR 825.205

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.

2 AAC 08.050(b)

7. If a pregnant employee takes medical leave due to a serious health condition, unrelated to the pregnancy, is the employee entitled to an <u>additional</u> 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.

Section III. Parental Leave

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 12-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.

29 CFR 825.200 AS 39.20.500(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 under AFLA 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 there from), it is available only in a single consecutive block of time.

AS 39.20.500(b)

9. If a health care provider orders the employee 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. The parental leave entitlement is not extended as a result of intermittent leave or a reduced schedule following recovery from birth.

29 CFR 825.200 AS 39.20.500(b) AAM 280.430

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 that entitle a qualified employee to medical leave. Childbirth entitles a qualified employee to parental leave. Other elective leave is not FMLA qualifying.

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).

11. Are eligible employees entitled to parental leave for the placement of a foster child under the state Act? The federal Act?

Section III. Parental Leave

FMLA: 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. The employee's family leave entitlement is not extended as a result of intermittent leave or a reduced leave schedule following placement.

AFLA: There is no entitlement for foster care placement under the AFLA.

29 CFR 825.112(a) AS 39.20.500(b)

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. (Persons who are "in loco parentis" include those with day-to-day responsibilities to care for and financially support a child or, in the case of an employee, who had the responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.)

29 CFR 825.112(e)

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

No. The employee is only entitled to a <u>total</u> 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.

29 CFR 825.200 AS 39.20.500(b)

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.

29 CFR 825.112 AS 39.20.500(b)

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.

Section III. Parental Leave

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?

POLICY: 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 in a single block of time. The employee's family leave entitlement is not extended as a result of intermittent leave or a reduced schedule following placement or recovery from birth.

AAM 280.430 2 AAC 08.050(b)

Section IV. Accommodations for Pregnant Employees

This section of the FAQs applies to both medical and parental leave under FMLA and AFLA.

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 39.20.520

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 39.20.520 2 AAC 07.226

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.

29 CFR 825.214 AS 39.20.520

4. What are the employee's rights on returning to work from parental leave?

On return from parental leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee’s absence.

29 CFR 825.215

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 CFR. 825.214 AS 39.20.500

Section V. Military Family Leave

The following are answers to common questions about the military family leave provisions of the new Family and Medical Leave Act (FMLA) regulations.

1. **What are the military family leave provisions of the FMLA?**

   On January 28, 2008, President Bush signed into law new FMLA leave entitlements for military families ("military family leave provisions"). The National Defense Authorization Act for FY 2008 ("NDAA"), Public Law 110-181, amended the FMLA to provide two types of military family leave for FMLA-eligible employees. The new FMLA regulations include these two types of military family leave referred to as "qualifying exigency leave" and "military caregiver leave." The National Defense Authorization Act for Fiscal Year 2010 signed by President Obama in October 2009 broadened the military leave provisions.

   29 CFR 825.100 and National Defense Authorization Act for Fiscal Year 2010

2. **Are all employers required to provide military family leave to their employees?**

   No. The FMLA applies only to public agencies, including state, local and federal employers, local educational agencies (schools), and private sector employers that employ 50 or more employees.

   29 CFR 825.104

3. **Are all employees of a covered employer entitled to take military family leave?**

   No. To be eligible to take FMLA leave for any qualifying reason, an employee of a covered employer must have worked for the employer for a total of 12 months, have worked at least 1,250 hours over the previous 12 months, and work at a location where at least 50 employees are employed by the employer within 75 miles. See the general FMLA FAQ at for additional information regarding employee eligibility.

   29 CFR 825.110

4. **Is military family leave paid?**

   No. The FMLA only requires unpaid leave. In accordance with AAM 280.390, paid leave is substituted for unpaid leave when available through accruals, donations, or other means authorized by collective bargaining agreements, Alaska Administrative Code, and/or Alaska Statutes. Leave is recorded in one-quarter (.25) hour increments.

   29 CFR 825.207 and AAM 280.390

Qualifying Exigency Leave

5. **What is "qualifying exigency leave" ?**

   "Qualifying exigency leave" is one of the two new military family leave provisions. It may be taken for any qualifying exigency arising out of the fact that a covered military member is on covered active duty or (or has been notified of an impending call or order to covered active duty in the Armed Forces. The new FMLA regulations include a broad list of activities that are considered qualifying exigencies and will permit eligible employees who are family members of a covered military member to take FMLA leave to address the most common issues that arise when a covered military member is deployed, such as attending military-sponsored functions, making appropriate financial and legal arrangements, and arranging for alternative childcare. For a complete list of qualifying exigencies, see question 11 below.

   29 CFR 825.126

Section V. Military Family Leave

6. Who is a "covered military member"?

A covered military member is the employee's spouse, son, daughter, or parent who is on covered active duty or call to covered active duty status.

29 CFR 825.800, 29 CFR 825.126(7)(b) and amended by the National Defense Authorization Act for Fiscal Year 2010

7. What is "covered active duty or call to covered active duty status"?

The term "covered active duty" means in the case of a member of a regular component of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country. "Covered active duty" means in the case of a member of a reserve component of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country under a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of Title 10, United States Code.

29 CFR 825.126(b)(2) and 29 CFR 825.800 and amended by 29 U.S.C. 2611 (by the National Defense Authorization Act for Fiscal Year 2010)

8. Are families of service members in the Regular Armed Forces eligible for qualifying exigency leave?

Yes. The 2010 NDAA expanded qualifying exigency leave to include employees with family members serving in a regular component of the Armed Forces.

29 U.S.C. 2611

9. Can I take qualifying exigency leave if my son or daughter is 18 years old or older?

Yes. The new FMLA regulations contain special definitions for son and daughter for both of the military family leave provisions. For qualifying exigency leave, an eligible employee may take leave for his or her son or daughter on covered active duty or has been notified of an impeding call or order to covered active duty in the Armed Forces, which is defined as the employee's biological, adopted, or foster child, stepchild, legal ward, or child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age.

29 CFR 825.122(g) and 29 CFR 827.127(b)(1)

10. Can I take qualifying exigency leave if the covered military member is my stepson or stepdaughter? Alternatively, can I take qualifying exigency leave if the covered military member is my stepparent?

Yes. Under the FMLA for qualifying exigency leave, a son or daughter on covered active duty or call to covered active duty status means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age. Additionally, under the FMLA for qualifying exigency leave, a "parent" means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter. This term does not include parents "in law."

29 CFR 825.122(g) and 29 CFR 827.127(b)(1)

Section V. Military Family Leave

11. What is a "qualifying exigency"?

The regulations provide a list of qualifying exigencies that encompass a wide range of specific activities in the following broad categories. Qualifying exigencies include:

- Issues arising from a covered military member's short notice deployment (i.e., deployment on seven or less days of notice) for a period of seven days from the date of notification;

- Military events and related activities, such as official ceremonies, programs, or events sponsored by the military or family support or assistance programs, and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross;

- Certain childcare and related activities arising from the covered active duty or call to covered active duty status of a covered military member, such as arranging for alternative childcare, providing childcare on a non-routine, urgent, immediate need basis, enrolling or transferring a child in a new school or day care facility, and attending certain meetings at school or a day care facility if they are necessary due to circumstances arising from the covered active duty or call to covered active duty of the covered military member;

- Making or updating financial and legal arrangements to address a covered military member's absence;

- Attending counseling provided by someone other than a health care provider for oneself, the covered military member, or the child of the covered military member, the need for which arises from the covered active duty or call to covered active duty status of the covered military member;

- Taking up to five days of leave to spend time with a covered military member who is on short-term temporary, rest and recuperation leave during deployment

- Attending to certain post-deployment activities, including attending arrival ceremonies, reintegration briefings and events, and other official ceremonies or programs sponsored by the military for a period of 90 days following the termination of the covered military member's covered active duty status, and addressing issues arising from the death of a covered military member; and

- Any other event that the employee and employer agree is a qualifying exigency

29 CFR 825.126

12. Can I take qualifying exigency leave to pick up a child from school or attend a school event?

Yes, in certain limited circumstances. An eligible employee caring for a covered military member's child may use qualifying exigency leave to provide childcare on an urgent, immediate need basis, but not on a routine, everyday basis, where the need to provide the care arises from the covered active duty or call to covered active duty status of the covered military member. Accordingly, an employee could use qualifying exigency leave to provide childcare in an emergency, such as a school closure due to inclement weather, if the employee's need to provide the care arises from the covered active duty status of a covered military member. Qualifying exigency leave could not be used, however, on a routine basis to provide daily childcare after school hours (although it could be used temporarily while making arrangements for such care). Qualifying exigency leave may also be used to attend certain meetings with school staff, if those meetings are necessary due to the covered active duty or call to covered active duty status of the covered military member. For example, qualifying exigency leave could be used to attend a meeting with a teacher to discuss behavioral problems related to the child's parent being deployed. Qualifying exigency leave may not be used, however, for attending routine school events, such as birthday parties or plays.

29 CFR 825.126

13. For what additional events may employers and employees agree to use qualifying exigency leave?

Employers and employees may agree to cover any additional events arising from the covered military member's covered active duty or call to covered active duty status as qualifying exigency leave. Such events may include leave to spend time with a covered military member either prior to or post deployment, or to attend to household emergencies that would normally have been handled by the covered military member. Employers and employees must agree to both the timing and duration of any such qualifying exigency leave and the leave may be counted against the employee's 12 week FMLA leave entitlement.

29 CFR 825.126

14. What type of notice must I provide to my employer when taking FMLA leave because of a qualifying exigency?

An employee must provide notice of the need for qualifying exigency leave as soon as practicable. For example, if an employee receives notice of a family support program a week in advance of the event, it is practicable for the employee to provide notice to his or her employer of the need for qualifying exigency leave the same day or the next business day. When the need for leave is unforeseeable, an employee must comply with an employer's normal call-in procedures absent unusual circumstances. An employee does not need to specifically assert his or her rights under FMLA, or even mention FMLA, when providing notice. The employee must provide "sufficient information" to make the employer aware of the need for FMLA leave and the anticipated timing and duration of the leave.

29 CFR 825.302, 29 CFR 825.303

15. What are the certification requirements for taking qualifying exigency leave?

The first time that an employee requests qualifying exigency leave, an 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 that indicates that the covered military member is on active duty or call to active duty status, and the dates of the covered military member's active duty service.

In addition, each time that an employee first requests leave for one of the qualifying exigencies; an employer may require certification of the exigency necessitating leave. Certification supporting leave for a qualifying exigency includes: appropriate facts supporting the need for leave, including any available written documentation supporting the request; the date on which the qualifying exigency commenced or will commence and the end date; where leave will be needed on an intermittent basis, the frequency and duration of the qualifying exigency; and appropriate contact information if the exigency involves meeting with a third-party. The State has developed a new optional form (Certification of Qualifying Exigency for Military Family Leave) for employees' use in obtaining certification that meets qualifying exigency leave certification requirements.

29 CFR 825.305, 29 CFR 825.309, 29 CFR 825.310, 29 CFR 825.302

16. Are the certification procedures (timing, authentication, clarification, second and third opinions, recertification) the same for qualifying exigency leave and leave due to a serious health condition?

The same timing requirements for certification apply to all requests for FMLA leave, including those for military family leave. Thus, an employee must provide the requested certification to the employer within

the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

If the qualifying exigency involves a meeting with a third party, employers may verify the schedule and purpose of the meeting with the third party. Additionally, an employer may contact the appropriate unit of the Department of Defense to confirm that the covered military member is on active duty or call to active duty status.

Employers are not permitted to require second or third opinions on qualifying exigency certifications. Employers are also not permitted to require recertification for such leave.

29 CFR 825.305, 29 CFR 825.309, 29 CFR 825.310, 29 CFR 825.306

17. How much FMLA leave may I take for qualifying exigencies?

An employee may take up to 12 workweeks of FMLA leave for qualifying exigencies during the twelve-month period established by the employer for FMLA leave. Qualifying exigency leave may also be taken on an intermittent or reduced leave schedule basis.

29 CFR 825.127 and 29 CFR 825.200

18. Is the 12 weeks of qualifying exigency leave a one-time entitlement?

No. If a covered military member's covered active duty or call to covered active duty status spans more than one FMLA leave year, an eligible employee would be eligible to take qualifying exigency leave in each FMLA leave year. Moreover, an eligible employee could take qualifying exigency leave in a subsequent FMLA leave year for a different covered military member. Finally, if the same covered military member returns from deployment and is subsequently redeployed, the eligible employee would again be entitled to qualifying exigency leave.

29 CFR 825.127 and 29 CFR 825.200

19. How much leave can I take if I need leave for both a serious health condition and a qualifying exigency?

Qualifying exigency leave, like leave for a serious health condition, is a FMLA-qualifying reason for which an eligible employee may use his or her entitlement for up to 12 workweeks of FMLA leave each year. An eligible employee may take all 12 weeks of his or her FMLA leave entitlement as qualifying exigency leave or the employee may take a combination of 12 weeks of leave for both qualifying exigency leave and leave for a serious health condition.

29 CFR 825.200

20. Can I take qualifying exigency leave when my "covered military member" returns from deployment?

Yes. An eligible employee is entitled to take qualifying exigency leave for certain qualifying post-deployment exigencies, including reintegration activities, for a period of 90 days following the termination of the covered military member's covered active duty status.

29 CFR 825.126

Section V. Military Family Leave

Military Caregiver Leave

21. What is "military caregiver leave"?

"Military caregiver leave" is the second of the two new military family leave provisions. Such leave may be taken by an eligible employee to care for a covered service member with a serious injury or illness. This type of FMLA leave is based on a recommendation of the President's Commission on Care for America's Returning Wounded Warriors.

29 CFR 825.127

22. Who is eligible to take military caregiver leave?

An eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member with a serious injury or illness may take job-protected FMLA leave to provide care to the service member.

29 CFR 825.127

23. Are families of service members in the Regular Armed Forces eligible for military caregiver leave?

Yes. Military caregiver leave extends to those seriously injured or ill members of both the Regular Armed Forces and the National Guard or Reserves.

29 CFR 825.127

24. Who is a "covered service member"?

The 2010 NDAA expanded the definition of "covered servicemember." The term "covered service member" means: ''(A) a member of the Armed Forces (including a member of the National Guard or Reserves) who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or ''(B) a veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.''

29 CFR 825.127 (amended by 29 U.S.C. 2611 and amended by Paragraph (8) of section 6381 of title 5, U.S.C.)

25. Can I take military caregiver leave if I am the stepson or stepdaughter of the covered service member or if I am the stepparent of a covered service member?

Yes. Under the FMLA for military caregiver leave, a "son or daughter of a covered service member" means a covered service member's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, and who is of any age. Under the FMLA for military caregiver leave, a "parent of a covered service member" means a covered service member's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered service member. This term does not include parents "in law."

29 CFR 825.127 and 29 CFR 825.122(g) and 29 CFR 827.127(b)(1)

26. What is a "serious injury or illness"?

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The 2010 NDAA amended the FMLA's definition of a "serious injury or illness." The definition is: ''(A) in the case of a member of the Armed Forces (including a member of the National Guard or Reserves), means an injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed Forces) and that 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 veteran who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during a period described in paragraph (15)(B), means a qualifying (as defined by the Secretary of Labor) injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran.
29 CFR 825.127 and 29 CFR 825.800 and 29 U.S.C. 2611 and amended by National Defense Authorization Act of 2010

27. How much leave may I take to care to for a covered service member?

An eligible employee is entitled to take up to 26 workweeks of leave during a "single 12-month period" to care for a seriously injured or ill covered service member. The "single 12-month period" begins on the first day the eligible employee takes military caregiver leave and ends 12 months after that date, regardless of the method used by the employer to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons.

29 CFR 825.127 and 29 CFR 825.200

28. May I take FMLA leave to both care for a covered service member and for another FMLA \ qualifying reason during this "single 12-month period?"

Yes. The FMLA regulations provide that an eligible employee is entitled to a combined total of 26 workweeks of military caregiver leave and leave for any other FMLA-qualifying reason in this "single 12-month period," provided that the employee may not take more than 12 workweeks of leave for any other FMLA-qualifying reason during this period. For example, in the single 12-month period an employee could take 12 weeks of FMLA leave to care for a newborn child and 14 weeks of military caregiver leave, but could not take 16 weeks of leave to care for a newborn child and 10 weeks of military caregiver leave.

29 CFR 825.127 and 29 CFR 825.200

29. Can I carry-over unused weeks of military caregiver leave from one 12-month period to another?

No. If an employee does not use his or her entire 26-workweek leave entitlement during the "single 12-month period" of leave, the remaining workweeks of leave are forfeited. After the end of the "single 12-month period" for military caregiver leave, however, an employee may be entitled to take FMLA leave to care for the covered military member if the member is a qualifying family member under non-military FMLA and he or she has a serious health condition.

29 CFR 825.127

30. Can I take military caregiver leave as the son or daughter of a covered service member if I am 18 years old or older?

Yes. The new FMLA regulations contain special definitions for son and daughter for both of the military family leave provisions. For military caregiver leave, an eligible employee may take leave if he or she is the "son or daughter of a covered service member," which is defined as the covered service member's

biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered service member stood in loco parentis, and who is of any age.

29 CFR 825.127

31. Who is a service member's "next of kin" for purposes of military caregiver leave?

The FMLA regulations define a covered service member's "next of kin" as the service member's nearest blood relative, other than the covered service member's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the service member by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered service member has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under FMLA, in which case the designated individual shall be deemed to be the covered service member's next of kin. The FMLA regulations provide that all family members sharing the closest level of familial relationship to the covered service member shall be considered the covered service member's next of kin, unless the covered service member has specifically designated an individual as his or her next of kin for military caregiver leave purposes. In the absence of a designation, where a covered service member has three siblings, for example, all three siblings will be considered the covered service member's next of kin.

29 CFR 825.127

32. Can I take military caregiver leave to care for a service member who is no longer serving in the military? What about for a retired member of the military?

Yes. Covered service members include a member of the Armed Forces (including a member of the National Guard or Reserves) who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness is or a veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.

National Defense Authorization Act for Fiscal Year 2010

33. Can I take military caregiver leave for more than one seriously injured or ill Service member, or more than once for the same service member if he or she has a subsequent serious injury or illness?

Yes. By the FMLA regulation, military caregiver leave is a "per-service member, per-injury" entitlement. Accordingly, an eligible employee may take 26 workweeks of leave to care for one covered service member in a "single 12-month period," and then take another 26 workweeks of leave in a different "single 12-month period" to care for another covered service member. An eligible employee may also take 26 workweeks of leave to care for a covered service member in a "single 12-month period," and then take another 26 workweeks of leave in a different "single 12-month period" to care for the same service member with a subsequent serious injury or illness (e.g., if the service member is returned to covered active duty and suffers another injury).

29 CFR 825.127

34. Can I take additional military caregiver leave if a covered service member receives a serious injury or illness and then, at a later time, manifests a second serious injury or illness?

Yes. If a covered service member incurs a serious injury or illness and manifests a second serious injury or illness at a later time, an eligible employee would be entitled to an additional 26-workweek entitlement to care for the covered service member in a separate "single 12-month period."

29 CFR 825.127

35. Can I care for two seriously injured or ill service members at the same time?

Yes. However, an eligible employee may not take more than 26 workweeks of leave during each "single 12-month period."

29 CFR 825.127

36. What type of notice must I provide to my employer when taking military caregiver FMLA leave because of a qualifying exigency?

An employee must provide 30 days advance notice of the need to take FMLA leave for planned medical treatment for a serious injury or illness of a covered service member. When 30 days advance notice is not possible, the employee must provide notice as soon as practicable taking into account all of the facts and circumstances. When the need for leave is unforeseeable, an employee must comply with an employer's normal notice or call-in procedures, absent unusual circumstances.

An employee does not need to specifically assert his or her rights under FMLA, or even mention FMLA, when providing notice. The employee must provide "sufficient information" to make the employer aware of the need for FMLA leave and the anticipated timing and duration of the leave.

29 CFR 825.302 and 29 CFR 825.303

37. Are there certification requirements for taking military caregiver leave?

Yes. When leave is taken to care for a covered service member with a serious injury or illness, an employer may require an employee to obtain a certification completed by an authorized health care provider of the covered service member. The State has developed a new form (Certification for Serious Injury or Illness of Covered Service member for Military Family Leave) for employees' use in obtaining certification that meets military caregiver leave certification requirements. This form reflects certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave to care for a covered service member with a serious injury or illness.

29 CFR 825.310

38. Are the certification procedures (timing, authentication, clarification, second and third opinions, recertification) the same for military caregiver leave and leave due to a serious health condition?

The same timing requirements for certification apply to all requests for FMLA leave, including those for military family leave. Thus, an employee must provide any requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

The FMLA regulations also permit employers to authenticate and clarify medical certifications submitted to support a request for military caregiver leave using the procedures applicable to FMLA leave taken to care for a family member with a serious health condition.

Employers are not permitted to require second or third opinions on military caregiver leave. Employers are also not permitted to require recertification for such leave.

29 CFR 825.310

39. Are private health care providers, as well as military health care providers, permitted to complete a certification for military caregiver leave?

Yes. A private health care provider can complete certifications for military caregiver leave if the health care provider is either a DOD TRICARE network authorized private health care provider or a DOD non-network TRICARE authorized private health care provider. Department of Defense health care providers and Veterans Affairs health care providers can also complete a certification for military caregiver leave. *See* 29 CFR 827.310(a).

29 CFR 825.310(a)

40. What if my covered service member receives a catastrophic injury and the military issues me travel orders to immediately fly to Landstuhl Regional Medical Center in Germany to be at his bedside. Do I have to provide a completed certification before flying to Germany?

No. Given the seriousness of the injuries or illnesses incurred by a service member whose family receives an "invitational travel order" (ITO) or "invitational travel authorization" (ITA), and the immediate need for the family member at the service member bedside, the regulations require an employer to accept the submission of an ITO or ITA, in lieu of the State's certification form, as sufficient certification of a request for military caregiver leave during the time period specified in the ITO or ITA.

The regulations also permit an eligible employee who is a spouse, parent, son, daughter or next of kin of a covered service member to submit an ITO or ITA issued to another family member as sufficient certification for the duration of time specified in the ITO or ITA, even if the employee seeking leave is not the named recipient on the ITO or ITA.

If the covered service member's need for care extends beyond the expiration date specified in the ITO or ITA, the regulations permit an employer to require an employee to provide certification for the remainder of the employee's leave period.

29 CFR 825.310(e)

41. How is leave designated if it qualifies as both military caregiver leave and leave to care for a family member with a serious health condition?

For military caregiver leave that also qualifies as leave taken to care for a family member with a serious health condition, the regulations provide that an employer must designate the leave as military caregiver leave first. The State believes that applying military caregiver leave first will help to alleviate some of the administrative issues caused by the running of the separate "single 12-month period" for military caregiver leave.

The FMLA regulations also prohibit an employer from counting leave that qualifies as both military caregiver leave and leave to care for a family member with a serious health condition against both an employee's entitlement to 26 workweeks of military caregiver leave and 12 workweeks of leave for other FMLA-qualifying reasons.

29 CFR 825.127

Section V. Military Family Leave

This section of the FAQs applies to both medical and parental leave under FMLA and AFLA and policies adopted through the Alaska Administrative Manual.

1. **What is reasonable notice to the employer when requesting family leave?**

   - Thirty (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.

   29 CFR 825.302, .303 AS 39.20.305(b)

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

   Upon notification of an employee's absence for a potentially qualifying condition, the supervisor or the supervisor's designee conditionally invokes the employee's absence as family leave within five working days of acquiring knowledge of a possible family leave qualifying condition. The supervisor or the supervisor's designee immediately notifies the Division of Personnel, as dictated by established procedures, when leave has been conditionally invoked.

   The Division of Personnel & Labor Relations officially designates an employee's absence as family leave. Designation occurs after sufficient information to make the determination is obtained. All attempts will be made to obtain this information upon the first qualifying absence. Failure to obtain this information and designate an absence as family leave does not prohibit the employer from retroactively applying family leave entitlements and protections to previous, qualifying absences. The Division of Personnel & Labor Relations notifies the employee and the employee's supervisor when family leave entitlements are invoked, denied, exhausted, and/or expired.

   29 CFR 825.208 AAM 280.370

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 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.

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.

The Division of Personnel & Labor Relations has composed letter templates that meet these notice requirements. These letters should be used when a supervisor conditionally invokes family leave and when Technical Services officially designates family leave for a qualifying employee.

29 CFR 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, all medical documents must be sent to the Division of Personnel who has the responsibility for maintaining an employee's medical file. The Americans with Disabilities Act requires such information to be filed separately.

ADA Title I, 42 USC 12101, CFR 1630.14 b (1)

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

Section V. Military Family Leave

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 employees and applicants for employment can readily see it.

A master copy of a poster meeting these requirements which also includes information about AFLA is posted to the Division's website for printing and posting.

29 CFR 825.300