



Navigating the Complexities of Title 5 Leave Programs


Presented By

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Alexandria, VA

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Today's Topics

- ▶ Leave Basics
- ▶ Annual Leave
- ▶ Sick Leave
- ▶ Disabled Veteran Leave
- ▶ Leave without Pay
- ▶ Leave Transfer
- ▶ FMLA including Paid Parental Leave
- ▶ Parental Bereavement Leave
- ▶ AWOL
- ▶ Inability to Perform & Excessive Absence

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LEAVE BASICS

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Types of Years




- ▶ Leave year - begins the first day of the first full biweekly pay period in a calendar year and ends the day immediately before the first day of the first full biweekly pay period in the following calendar year
- ▶ List: [Leave Year Beginning and Ending Dates \(opm.gov\)](#)
- ▶ 2023 dates
 - Leave year began – Jan. 1, 2023
 - Leave year ends – Jan. 13, 2024
 - Use or lose scheduling deadline – Dec. 2, 2023
 - 27 pay periods this year per OPM
- ▶ Fiscal year – 1 October through 30 September
 - Applies to military leave
- ▶ FMLA year – any 12-month period

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Requesting Leave



- ▶ Employees request leave and management answers "yes" or "no"
- ▶ Request should be specific as to type, number of hours, any special conditions met
- ▶ Leave policies generally require scheduling of leave in advance except for emergencies – annual, sick, FMLA, etc.

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Disapproval of Leave







- ▶ Employee may request review through applicable grievance procedure
- ▶ Review of a disapproval could also arise in an EEO complaint or other type of appeal
- ▶ To defend, must show that decision complied with regulations and/or policy and relevant union contract provisions

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Changing the Decision





- ▶ If information comes to light later that the request was based on something not true, the supervisor may undo the approval
- ▶ Change leave to AWOL

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Justice at Justice





- ▶ Douglas DaCosta, Criminal Investigator with BATF, took 80 days of sick leave between January 2009 and his retirement in June
- ▶ Claimed he had cancer and was undergoing extensive treatment - forged documents from a doctor – was actually working a private sector job
- ▶ IG investigated – brought action under False Claims Act
- ▶ Settled case with DaCosta and he agreed to repay \$40,000 to account for the improper payments
- ▶ Justice announced August 10, 2016 Press Release No. 16-928
- ▶ Keep investigating even after they are gone!!!!

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General Principle

- ▶ If absence/leave was not disapproved by management, generally cannot be used as a basis for discipline
- ▶ Exception applies when absence is excessive (months) with no end in sight (cover at end of today's session)

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ANNUAL LEAVE

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Annual Leave

- ▶ For vacation and time off to meet other personal or emergency needs
- ▶ An employee's legal right, subject to scheduling in accordance with management's needs



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Deciding on Annual Leave Requests

- ▶ Workload exception - annual leave substituted in place of FMLA LWOP or to cover absence because of military duty may not be denied
- ▶ Employees not required to provide reason for annual leave under most circumstances
- ▶ Employee may volunteer the reason for the need for leave if it might not otherwise be approved
- ▶ Management's decision on the request always be based on workload -- not punishment or retaliation

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Leave Required for Incarceration?

- ▶ No obligation to grant discretionary leave (AL, LWOP) because absence of incarcerated employee is beyond his control
- ▶ However, leave denial must be reasonable
 - Rely on work force needs, effect of absence
 - Length of expected absence

Benally v. DoI,
71 MSPR 537 (1996)

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SICK LEAVE

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Sick Leave Accrual


- ▶ Accrued per pay period
 - Full time employees – 4 hours per pay period
 - Part-time/Other schedules – pro-rated
- ▶ Unlimited accumulation



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Sick Leave Accrual II




- ▶ Unused sick leave counts toward annuity after minimum eligibility met
- ▶ CSRS - existing benefit
- ▶ FERS - granted by National Defense Authorization Act for FY 2010 -- phased in allowance
 - ↳ 100% credit since January 1, 2014

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Sick Leave Uses – 5 CFR 630.401



- ▶ Must be granted when the employee
 - Receives medical, dental, or optical examination or treatment
 - Is incapacitated for duty by physical or mental illness, injury, pregnancy, or childbirth
 - Provides care for a family member as a result of 1) physical or mental illness; injury, pregnancy; childbirth, 2) medical, dental, or optical examination or treatment, 3) exposure to a communicable disease*




* Amount used in leave year limited

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Sick Leave Uses – 5 CFR 630.401



- ▶ Must be granted when the employee
 - Makes arrangements necessitated by the death of a family member or attends family member's funeral*
 - Has been medically determined to have been exposed to a communicable disease and presence at work would jeopardize health of others
 - Must be absent from duty for purposes relating to the adoption of a child


* Amount used in leave year limited

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Examination/Treatment




- ▶ Authorized for amount of time needed for appointment and reasonable travel time
- ▶ Routine appointments generally would not require a full day's absence on sick leave

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Medical Appointments



- ▶ Routine appointments should be scheduled around workload considerations - Supervisor may ask employee to reschedule (See 85 FR 48079) (PPL)
- ▶ Discipline upheld for employee denied leave for non-emergency medical treatment
AFGE Local 916 and USAF Tinker AFB, 68 FLRA 457 (Apr. 16, 2015)

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Examination/Treatment

- ▶ OPM Guidance 6/27/2022 - Travel for Medical Care
 - Q: What type of supporting evidence must a Federal employee submit for the use of sick leave?
 - A: An employee should provide administratively acceptable evidence for the use of sick leave. 5 CFR 630.405. An agency may consider an employee's self-certification as to the reason for the employee's absence as administratively acceptable evidence, regardless of the duration of the absence. For an absence in excess of three workdays (or a lesser period when determined necessary by the agency), an agency may require the employee to provide a medical certificate or other administratively acceptable evidence. **A medical certificate simply means a written statement signed by a physician or other practitioner certifying that the employee received an examination or treatment; it need not contain details regarding the medical examination or treatment. 5 CFR 630.201(b)**
Availability of Sick Leave for Travel to Access Medical Care (opm.gov)


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Incapacitation

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- ▶ Sick leave is authorized for the period of incapacitation – no limits on amount which can be used
- ▶ If employee has leave to his/her credit and follows leave procedures, sick leave must be granted



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Incapacitation

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- ▶ As long as the employee meets requirements, sick leave must be granted
- ▶ When absence extends beyond what the agency believes is reasonable, an excessive absence action may be appropriate (discussion later in presentation) – but must continue granting SL as long as on the rolls and conditions are met

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Illustration 1: Incapacitation

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Jeff began the leave year with 1300 hours of SL. He used these amounts for his own medical issues:


- 320 hours for surgery and recuperation thereafter
- 240 hours for dialysis appointments
- 40 hours for appointments, e.g. eye doctor, dentist, podiatrist, etc.

Jeff's condition has worsened. His physician has indicated that he needs to be off for six more weeks (240 hours) to see if eliminating job stress and physical activity will ensure that the dialysis is successful. Must this be granted?

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Illustration 1: Incapacitation



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Jeff's condition has worsened. His physician has indicated that he needs to be off for six more weeks (240 hours) to see if eliminating job stress and physical activity will ensure that the dialysis is successful. Must this be granted?

Yes, assuming the medical certificate is in order and submitted in a timely manner. This will bring the total to 840 hours in the leave year. An excessive absence case may be looming.

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Questions




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Family Care & Bereavement Uses

- ▶ Added by Federal Employees Family Friendly Leave Act of 1994
- ▶ Provisions implemented by regulations amended multiple times since 1994 - last amended July 2010
- ▶ Amount of sick leave which can be used for care is tied to types of conditions

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Family Care Sick Leave



- ▶ Non-serious health conditions
- ▶ Includes colds, seasonal flu, earaches, headaches (except migraines), allergies, etc.
- ▶ Limited to 13 workdays (104 hours) per leave year if available



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Family Care Sick Leave II






Additional entitlements for care of a family member with a serious health condition (discuss in FMLA unit)

- ▶ Limits (5 CFR 630.401(b)-(d)):
 - 480 hours (12 weeks) per leave year if available
 - Previous use of any portion of 104 hour/13-day allocation for other than serious health conditions or bereavement deducted from 480
- ▶ **This 12 weeks of paid leave entirely separate from and in addition to FMLA time off**

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**Family Member Under SL
5 CFR 630.201**

- ▶ Spouse and his/her parents
- ▶ Children, including adopted children, and their spouses
- ▶ Parents and their spouses
- ▶ Brothers and sisters and their spouses
- ▶ Grandparents and grandchildren, stepparents and stepchildren, and domestic partners in committed relationships (and their parents/spouses) (7/2010)
- ▶ Any individual related by blood or affinity whose close association with the employee is equivalent of a family relationship
- ▶ *Definition also applies to leave transfer*

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Family Care Sick Leave Info

- ▶ Serious health condition defined in FMLA regulations at 5 CFR 630.1202
 - Cancer, heart attack, stroke (cover in FMLA unit)
- ▶ Limits are maximums authorized by regulation
- ▶ Amount employee has accrued is not determinative
- ▶ Not subject to waiver by agencies/supervisors
- ▶ Use of precise timekeeping codes assists in tracking grant of leave against limits

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III. 2: Sick Leave Limits

Dave has 800 hours of sick leave. In the current leave year he used these amounts of sick leave:

- 100 hours when his mother had pneumonia
- A total of 64 hours used in short increments for a variety of his personal illnesses and doctor's visits

Dave's wife has been diagnosed with terminal cancer. He has asked for the 480 hours of sick leave to be used during this same leave year. How much can be granted?

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III 2: Sick Leave Limits

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Dave's wife has been diagnosed with terminal cancer. He has asked for the 480 hours of sick leave to be used during this same leave year. How much can be granted?

380 hours of sick leave can be granted. The 100 hours of sick leave to care for his mother must be deducted from the entitlement of 480 hours for serious health condition. Dave could request 100 hours of AL or LWOP to cover the additional time off.

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Bereavement

- ▶ May be used for purposes related to death of family member including:
 - Making arrangements necessitated by death
 - Attending funeral
 - Travel time
- ▶ Limitation
 - Any leave used included in limitation under family care (13 days/104 hours)
- ▶ Parental Bereavement covered later today


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Communicable Disease





Use of sick leave is appropriate when it is determined by health authorities or health care provider that employee's exposure to a communicable disease would jeopardize the health of other employees.



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Diseases





- ▶ Communicable diseases where Federal isolation and quarantine are authorized, currently include:
 - Cholera, diphtheria, infectious tuberculosis, plague, smallpox, yellow fever, viral hemorrhagic fevers, Severe Acute Respiratory Syndrome (SARS), and influenza that causes or has the potential to cause a pandemic

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COVID




- ▶ Feb 2020 – OPM Guidance
 - Because of risk to public safety, weather and safety leave is being given for an affected employee instead of requiring use of this type of sick leave
- ▶ Current Safer Federal Workforce Task Force
 - If employee unable to telework must isolate/ quarantine, should request SL, AL, LWOP, etc.
 - Weather and safety leave may be given under current guidance for vaccination

Leave|Safer Federal Workforce


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Adoption




- ▶ Covers activities necessary for adoption to proceed - which may differ among jurisdictions/agencies
- ▶ Examples:
 - Appointments with adoption agencies, social workers, attorneys , etc.
 - Court proceedings
 - Required travel
- ▶ No limit on how much used
- ▶ Foster care is not covered




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Sick Leave Verification




- ▶ Medical certification normally required for absences extending beyond three days (5 CFR 630.403(a))
- ▶ Agency policies may provide that medical certificates can be required for absences of less than three days where abuse is suspected by:
 - Counseling the employee regarding suspected abuse
 - Observing for a period to see if situation improves
 - If record does not improve, issuing a letter of requirement/leave restriction





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Sick Leave Verification II




- ▶ Letters of requirement or leave restrictions have certain characteristics:
 - Generally grievable – places a requirement on the employee over and above what others have to meet
 - Typically remain in effect for six months or one year – some agencies provide for review/possible extension if problems recur

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Sick Leave Verification III



- ▶ Agency may require medical certification for three days or less when the agency determines it is necessary 5 CFR 630.405(a)
- ▶ Examples:
 - Employee requested annual leave which was denied and then calls in sick on same date
 - Employer learns that the employee was doing something other than what was claimed – incapacitated but on vacation; caring for a family member but working another job
- ▶ Certification obtained after the fact may not be dispositive
 - Ex: If incapacitated when seen after the fact it does not necessarily mean the employee was incapacitated for the period when sick leave was requested

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DISABLED VETERAN LEAVE

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Wounded Warriors Federal Leave Act of 2015




- ▶ Signed by President Obama Nov. 5, 2015 – effective Nov. 5, 2016
- ▶ OPM final regulations issued Aug. 5, 2016 (81 FR 51775)
- ▶ Created new category – “disabled veteran leave”
- ▶ Grants disabled veterans up to 104 hours of leave in first year of employment for treatment for the service-connected condition - only other use is required rest after treatment
- ▶ Applies upon initial employment to disabled veterans with service-connected disabilities of 30 percent or more hired on Nov. 5, 2016 and thereafter

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Wounded Warriors (cont.)




- ▶ Any balance remaining of the 104 hours is not carried over into the next leave year
- ▶ Requires employee to verify that leave being used for treatment of service-connected disability



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LEAVE WITHOUT PAY

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Leave Without Pay





- ▶ Requested by employee
- ▶ Approved non-pay status
- ▶ Is a matter of managerial discretion except an entitlement in four situations:
 - FMLA
 - Uniformed Services Employment and Reemployment Rights Act of 1994 (P.L. 103-353) provides entitlement to LWOP when employment is interrupted by period of service in uniformed service (5 CFR 353.106)

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Leave Without Pay II





- ▶ Last two required situations:
 - E.O. 5396, July 17, 1930, provides that disabled veterans are entitled to LWOP for necessary medical treatment
 - Employees receiving workers' compensation payments from the Department of Labor
- ▶ Some agency policies grant LWOP for spouses/dependents of transferring military/civilian members, educational uses, etc.
- ▶ Position remains encumbered while employee on LWOP
- ▶ Normal maximum increment is 52 weeks but no legal limit on duration

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Granting LWOP

- ▶ If employee requested LWOP for the periods when she was placed in an AWOL status, the Board will examine the record as a whole to determine if the denial of LWOP was reasonable under the circumstances.

Joyner v. Navy, 57 MSPR 154, 159 (1993)
- ▶ Ordinarily, when an employee who is incapacitated for duty has exhausted all of her leave, an agency may properly deny her LWOP request where there is no foreseeable end in sight to her absences and where those absences are a burden on the agency

Savage v. Army, 2015 MSPB 51

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LEAVE TRANSFER

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Leave Transfer

- ▶ Provides for donation of annual leave to other federal employees in non-pay status due to medical emergency
- ▶ Recipient:
 - May be affected personally or is providing care for a family member (same definition as sick leave)
 - Must be absent (or expected to be) for 24 hours without available paid leave
 - Applies and provides medical documentation


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Leave Transfer II

- ▶ Agencies determine where to solicit donations
- ▶ Employees:
 - Entitled to donate to a family member (5 CFR 630.906(f)(1))
 - Determine what information is to be shared
- ▶ Normal maternity situations meet medical emergency criteria



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Questions




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Break



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**FMLA INCLUDING
PAID PARENTAL
LEAVE (PPL)**


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Family and Medical Leave Act




- ▶ **Entitlement to twelve weeks of unpaid leave for:**
 - Birth of son or daughter and care for that child
 - Placement of a son or daughter for adoption or foster care and care of that child
 - Serious personal medical condition
 - The care of a spouse, son, daughter, or parent of the employee, if such spouse, son, daughter, or parent has a serious health condition
 - Any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on covered activity duty in Armed Forces
- ▶ Entitlement applies to a year - any 12-month period

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Coverage



- ▶ Most Federal employees are covered by Title II of the Act
 - Earn and use leave under 5 USC Chapter 63
- ▶ Those not covered by Title II:
 - USPS
 - FAA
 - Legislative branch other than GPO




5 CFR 630.1201

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Coverage - Service



- ▶ In order to utilize FMLA an employee must:
 - Earn and use leave under 5 USC 63
 - Have completed 12 months of Federal civilian service
 - Be employed in other than a temporary or intermittent position
- ▶ Must be eligible for FMLA to use PPL




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Family Member under FMLA



- ▶ Son or daughter – biological, adopted or foster child, stepchild, legal ward under 18 or 18 or older and incapable of self-support
 - Must be disabled and unable to provide self-support because of the disability at the time the absence begins
 - Self-support defined using activities related to daily living – must need assistance in three things such as grooming themselves/hygiene, using public transportation, eating





5 CFR 630.1202

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Parent

- ▶ Biological parent or someone who stands or stood *in loco parentis*
- ▶ Provides day-to-day care or financial support
- ▶ OPM CPM 2010-15 8/31/2010 provides examples:
 - Employee provides day-to-day care for his or her domestic partner's child but does not financially support the child
 - Grandparents who take in a grandchild and assume ongoing responsibility for raising the child because the parents are incapable of providing care

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Family Member - Spouse




- ▶ Spouses are covered if marriage was legal where “celebrated”
- ▶ Common law marriage covered if recognized by state; list available at: <http://www.ncsl.org/research/human-services/common-law-marriage.aspx>
- ▶ OPM final regulations effective 5/9/2016 81 FR 20523



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Family Members




FMLA	Sick Leave
spouse	spouse, and parents thereof
children up to 18 or children over 18 and incapable of self-care	children and spouses thereof
parents	parents
	grandparents and grandchildren, stepparents and stepchildren, and domestic partners in committed relationships
	brothers and sisters, and spouses thereof
	any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship

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Serious Health Condition



- ▶ Illness, injury, impairment or condition that involves either inpatient care or continuing treatment
 - Inpatient care – overnight stay in medical facility


5 CFR 630.1202



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Serious Health Condition II



- ▶ Continuing treatment
 - Incapacity of more than three consecutive days that also involves treatment two or more times or regimen of treatment such as medication or therapy
 - Incapacity due to pregnancy or prenatal care
 - Incapacity due to chronic condition or incapacity that is permanent/long term but treatment is not effective
 - Multiple treatments including recovery time

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Serious Health Condition III

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- ▶ OPM examples: heart attacks, most cancers, back conditions requiring extensive therapy, appendicitis, pneumonia, emphysema, miscarriages, complications or illnesses related to pregnancy, prenatal care, childbirth and recovery from childbirth
- ▶ Also included: substance abuse treatment, providing hygienic care for someone unable to care for themselves, dialysis for kidney disease, physical therapy for severe arthritis

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More on Serious Health Conditions

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- ▶ Not a Serious Health Condition
 - Common colds, flu, earaches, minor ulcers, headaches (except migraines), allergies, cosmetic treatments except if inpatient hospital care is required
 - Routine examinations, regimen of treatment that includes taking over the counter medication, absence because of use of illegal substance unless in treatment

5 CFR 630.1202

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Illustration 3: Employee FMLA

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Dale has lung cancer. He began the leave year with 1600 hours of SL and used 640 hours for:

- 320 hours for surgery and recuperation thereafter
- 320 hours for chemotherapy, radiation, and incapacitation resulting from the treatments

Dale is a key member of the team and his absences are creating a hardship on the group. Dale's condition is poor. His physician has indicated that he needs to be off for a minimum of six more weeks (240 hours) to see if he can regain his strength. Dale invoked FMLA and asked to substitute SL for the LWOP. Must this be granted?

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Illustration 3: Employee FMLA 

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Yes, assuming the FMLA request is in order and submitted in a timely manner. This will bring the total to 880 hours in the leave year. However, none of the 240 hours of FMLA or SL substituted for FMLA LWOP may be included in an excessive absence case.

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Intermittent Use of FMLA 

- ▶ Other than birth and adoption, leave may be used intermittently
 - Health condition itself may be intermittent
 - ↳ Documentation from health care provider must include dates of planned treatment/period of recovery or likely duration and frequency of incapacity
 - Employee may only be needed because care is also provided by another party


5 CFR 630.1205

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Requesting FMLA Leave 

- ▶ Employee invokes his/her entitlement by requesting FMLA leave
- ▶ OPM authorizes use of the Department of Labor Forms WH-380 E & F
- ▶ Employee should request leave 30 calendar days in advance of the need if foreseeable



5 CFR 630.1203(b)

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Requesting FMLA Leave II

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- ▶ May not be requested retroactively unless both employee and representative were incapacitated and unable to make request
- ▶ If incapacitated, request must be submitted in five workdays upon return to work



5 CFR 630.1203(b)

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Supporting FMLA Request

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- ▶ Medical information must include:
 - the date the serious health condition commenced
 - the probable duration of the serious health condition or specify that the serious health condition is a chronic or continuing condition
 - the appropriate medical facts within the knowledge of the health care provider regarding the serious health condition, including a general statement as to the incapacitation, examination, or treatment that may be required by a health provider

5 CFR 630.1208(b)

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FMLA Request II

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- ▶ If it is a family member with the serious health condition, the medical information must include:
 - A statement that the spouse, son, daughter, or parent of the employee requires psychological comfort and/or physical care; needs assistance; and would benefit from the employee's care or presence, and
 - A statement from the employee about the care that he or she will provide and an estimate of the amount of time needed to care for that family member

5 CFR 630.1208(b)(4)




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FMLA Request III



▶ If it is the employee with the serious health condition, the medical information must include:

- A statement that the employee is not able to perform one or more of the essential functions of the position or requires medical treatment for a serious health condition




5 CFR 630.1208(b)(5)

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
Insufficient Medical Certification



▶ “Unable to work” is not sufficient (*Burge v Air Force*, (99 FMSR 5178))

- Air Force said “unable to work” was insufficient and asked for more info
- Burge did not comply – absences not approved
- MSPB found him not protected by FMLA

▶ Similar to “under my care,” “out of work,” etc.



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Questions




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Substitution of Paid Leave 

- ▶ Under FMLA an employee may substitute available paid leave for all or any portion of an approved FMLA leave
- ▶ Paid leave includes
 - Accumulated annual or sick leave
 - Advanced annual and/or sick leave
 - Leave made available through the leave transfer program
 - Paid Parental Leave (effective 10/1/2020)
 - Compensatory time and credit hours may not be substituted
- ▶ Substitution of leave must be consistent with current laws/regulations governing the granting and use of that leave

5 CFR 630.1206

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Annual Leave  

- ▶ Annual Leave – no denying it
 - OPM final regulations issued 12/5/1996 (61 FR 64445)
 - “Once an employee has invoked his or her entitlement to FMLA leave and has provided all the necessary notifications and certifications for agency approval, an agency may not deny an employee’s request to substitute annual leave. However, an employee cannot substitute any more annual leave than he or she has available.”

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Sick Leave Substitution 

- ▶ Employee serious health condition
 - May use as much sick leave as accrued up to FMLA limit
- ▶ Care for family member
 - Family care/bereavement limits apply to FMLA usages (5 CFR 630.1206(b)(1))
 - If sick leave limit is reached during FMLA period, employee may request annual leave if available or stay on LWOP

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PAID PARENTAL LEAVE

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Paid Parental Leave

- ▶ Included in NDAA for FY 2020 – section entitled “Federal Employee Paid Leave Act”(FEPLA)
- ▶ Grants 12 administrative workweeks of paid family leave paid out of agency funds for salaries
- ▶ May be used at any time within 12-month period from date of birth or placement
- ▶ Interim OPM regulations – new 5 CFR 630 Subpart Q issued 8/10/2020
- ▶ Employees will have to have one year of service and be employed in other than temporary or intermittent position to be eligible – just like other uses of FMLA
- ▶ Both parents have a full entitlement

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Paid Parental Leave II

- ▶ Service agreement required that the employee will return to work for at least 12 weeks:
 - Leave cannot be granted without service agreement
 - If he/she does not fulfill the agreement, agency can recoup the government’s share of health insurance payments
 - Waiver provisions will be available if he/she cannot return for medical or similar reasons

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Purpose of FEPLA

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- ▶ Purpose of paid parental leave is for care of newly born or newly placed son or daughter and for bonding with the child
("Summary of Law" 85 FR 48075)
- ▶ Determinations hinge on whether there is a new parent-child relationship which is qualifying



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Bonding

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- ▶ Leave to cover periods when the parent-employee is in the home with the child or is otherwise involved in spending time with the child (bonding).
 - Leave may be used to cover short periods away from child's physical presence to support care such as buying baby food, diapers, etc.
 - Leave would not be appropriate if employee engaged in activities not directly connected to care of child or if the employee is outside the local geographic area where the child is located.

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Illustration 4: Bonding

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Marco's baby was born on September 18th. He invoked FMLA in August to begin on September 18th for 12 weeks. He asked to substitute 12 weeks of PPL for bonding with his child. After 4 weeks everyone is doing fine. The baby is sleeping long periods and mom is getting rest. Marco's mother lives 150 miles away. In late October she calls about a major plumbing problem and asks if he can take two days to come fix it. Marco leaves and goes to his mother's. It ends up being three days that he is away from his wife and son.


Could Marco be in trouble?

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Illustration 4: Bonding



Marco's baby was born on September 18th. He invoked FMLA in August to begin on September 18th for 12 weeks. He asked to substitute 12 weeks of PPL for bonding with his child. After 4 weeks everyone is doing fine. The baby is sleeping long periods and mom is getting rest. Marco's mother lives 150 miles away. In late October she calls about a major plumbing problem and asks if he can take two days to come fix it. Marco leaves and goes to his mother's. It ends up being three days that he is away from his wife and son.



Could Marco be in trouble?

Yes. Use of the FMLA/PPL is not appropriate under these circumstances. He should have called in and asked for AL for those three days.

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Intermittent Use





▶ Intermittent use:
→ 5 CFR 630.1205(a) – leave for birth or placement "... shall not be taken intermittently or on a reduced leave schedule unless the employee and the agency agree to do so.

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FMLA Hours Limit



- ▶ Law on maximum of 12 administrative workweeks in 12-month period hasn't changed
- ▶ May only use balance if some FMLA already used
- ▶ Consider this example:
 - Birth mom expecting on December 30, 2022
 - Her father in serious car accident on September 1, 2022. She uses 280 hours of FMLA beginning September 1 for his care
 - Baby arrives December 30 - only 200 FMLA hours remain through August 31, 2023. She could be off on FMLA for 200 hours and substitute 200 hours of PPL
 - She should be able to take additional 280 hours of PPL at some point after August 31, 2023 as long as she does so before December 29, 2023

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**PARENTAL
BEREAVEMENT
LEAVE**

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Parental Bereavement Leave



- ▶ Included in NDAA for FY 2022 signed by President Biden Dec. 27, 2021
- ▶ OPM guidance issued Apr. 1, 2022 - CPM 2022-08
- ▶ Effective date signed - employees may request retroactively if eligible since date of passage
- ▶ Reference: Title XI, Sec. 1111 of NDAA for FY 2022

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Parental Bereavement Leave II

- ▶ Provisions
 - Leave applies upon death of a son or daughter of employee
 - Utilizes FMLA definition of employee from
 - ↳ One year of service, doesn't cover temporary or intermittent employees, etc.
 - Utilizes FMLA definition of son or daughter
 - ↳ Biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is—(A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability

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Parental Bereavement Leave IV




- ▶ Provisions (cont.)
 - Amount of leave limited to two administrative workweeks in twelve-month period which extends from date of death
 - Leave may not be used intermittently or on a reduced schedule unless agency agrees
 - If need for leave is foreseeable, employee shall provide agency with "reasonable" and "practicable" notice

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ABSENCE WITHOUT LEAVE




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**Absence Without Leave/
Unauthorized Absence**



- ▶ Employee status when absence **not** approved
- ▶ Employee is not paid for AWOL period
- ▶ Is not disciplinary, but may be basis for discipline




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AWOL/UA



- ▶ Recorded as exact amount of time absent – or minimum leave increment if required by time keeping system
- ▶ When an employee is charged with leave for an unauthorized absence or tardiness, the agency may not require him to perform work for any part of the leave period charged against his account (5 CFR 630.206(b))

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INABILITY TO PERFORM & EXCESSIVE ABSENCE


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Options




- ▶ When employee is too ill to be at work and there is no real chance of recovery, options include
 - Disability retirement – employee must initiate
 - Separation disability
 - Removal for excessive absence



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Separation Disability



- ▶ May also be charged as “inability to perform” or “medical inability to perform”
- ▶ Employee physically or mentally unable to meet job requirements - removal based on assessment supported by medical information
- ▶ Impact on performance or conduct is not the basis of the action, even though they may exist - action is taken on inability to perform

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Approved Leave Charge




- ▶ General rule – agency may not take an adverse action against an employee based on approved leave
Webb v. USPS, 82 FMSR 5137
- ▶ Exception – Excessive Absence
Cook v. Army, 84 FMSR 5013



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Cook Criteria




- ▶ Record shows employee was absent for compelling reasons beyond his/her control so that the agency's approval or disapproval of leave was immaterial
- ▶ Absences continued beyond a reasonable time, and employee was warned that adverse action might be initiated unless he/she became available for duty on a regular basis, and
- ▶ Agency shows position needed to be filled by an employee available for duty on a regular basis

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FMLA and Excessive Absence





- ▶ FMLA leave may not be used in excessive leave charge
 - May be based on sick leave, annual leave, and/or LWOP, but not FMLA
 - Caution: Substituted sick and annual leave is still FMLA protected leave
(McCauley v. Interior, 111 FMSR 224)
- ▶ AWOL must be a separate charge
(Savage v. Army, 115 FMSR 230)

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How Much Absence?

- ▶ 252 ¾ hours of LWOP and 80 ¾ hours AWOL for a total of 333 ½ hours of unscheduled absences in a six-month period was sufficient for removal of a GS-4 Medical Support Assistant in an Army Hospital
Gartner v. Army, 107 FMSR 200

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Thank you for your participation!

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