



## TEXAS TECH UNIVERSITY™

## Operating Policy and Procedure

**OP 70.32: Family and Medical Leave Act (FMLA) and Parental Leave****DATE:** August 8, 2017~~DRAFT~~

**PURPOSE:** The purpose of this Operating Policy/Procedure (OP) is to establish the Texas Tech University (TTU) policy for administering the provisions of the Family and Medical Leave Act (FMLA) in compliance with Department of Labor guidelines pertaining to family and medical leave (FMLA Leave) and parental leave in compliance with the Texas Government Code.

**REVIEW:** This OP will be reviewed in August~~June~~ of odd-numbered years by the Assistant Vice President~~managing director~~ of Human Resources with substantive revisions forwarded through the Associate Vice President~~Vice President~~ for administration and Chief of Staff~~to the President~~.

**POLICY/PROCEDURE****Overview**

The Family and Medical Leave Act (FMLA) entitles eligible employees of Texas Tech University to take unpaid, job-protected leave for serious health conditions and/or specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. Texas Tech TTU allows~~requires~~ the use of sick leave, ~~and~~ vacation leave, and any other applicable leave accruals~~accruals~~ while on Family and Medical Leave - (FMLA)~~TTU~~. Employees are **required** to apply for FMLA coverage as outlined in this policy for any FMLA-qualifying conditions/events requiring absence from work. Employees who do not qualify for leave under the FMLA ~~leave~~ are eligible to take parental leave, not to exceed 12 workweeks, for the birth of a natural child or the adoption or foster care placement of a child under three years of age.

**1. FMLA Eligibility Requirements**

To be eligible for FMLA benefits, the employee must meet all of the following requirements:

- a. Must have been employed by the state for at least 12 months **and**
- b. Must have worked at least 1,250 hours during the 12 months preceding the first date of requested leave.

While the 12 months of employment need not be consecutive, employment periods prior to a break in service of seven years or more need will not be counted unless the break is occasioned by the employee's fulfillment of his/her uniformed services (as protected under the Uniformed Services Employment and Reemployment Rights Act (USERRA)), or a written agreement exists concerning the employer's intention to rehire the employee after a break in service.

## 2. FMLA Entitlements

Eligible employees are entitled to:

- a. Twelve workweeks of leave in a 12-month period for:
  - (1) The birth of a child and to care for the newborn child within one year of birth;
  - (2) The placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement;
  - (3) To care for the employee's spouse, child, or parent who has a serious health condition;
  - (4) A serious health condition that prevents the employee from performing the essential functions of his/her job; or
  - (5) Any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty."
- b. Twenty-six workweeks of leave during a single 12-month period to care for a covered service member with a serious injury or illness if the eligible employee is the service member's spouse, son, daughter, parent, or next of kin (military caregiver leave).
- c. Married couples: In cases where both spouses are employed by Texas Tech TTU or another state agency, the two spouses together may take are limited to a combined total of 12 workweeks leave during any 12-month period for: reasons (1) and (2) or to care for the same individual pursuant to reason (3).
  - (1) The birth of a child and to care for the newborn child within one year of birth;
  - (2) The placement with the employee of a child for adoption or foster care and to care for a newly placed child within one year of placement
  - e-(3) To care for a parent who has a serious health condition
- d. The 12-month period noted in this policy is a "rolling" 12-month period measured backward from the first date an employee uses any FMLA leave. Each time an employee takes FMLA leave, the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the 12 months preceding the leave begin date.

## 3. Eligible Family Members

- a. Spouse

~~A "spouse" means the individual's spouse, as determined under the law of the state in which the employee resides, whether opposite-sex or same-sex, or married under common law marriage, that either:~~

- b. Son or Daughter

For FMLA leave taken for the birth, adoption, or to take care of a family member with a serious health condition, a "son or daughter" is defined as a biological, adopted, or foster child, a stepchild, a legal ward, or a child of an employee standing in loco parentis, who is either under 18 years of age, or 18 years of age or older and is incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence.

- c. Parent

A "parent" is defined broadly as a biological, adoptive, step, or foster parent, or an individual

**Commented [WS1]:** Final Rule Effective Date 3/27/15 The Final Rule changes the regulatory definition of spouse in 29 CFR §§ 825.102 and 825.122(b) to look to the law of the place in which the marriage was entered into, as opposed to the law of the state in which the employee resides. A place of celebration rule allows all legally married couples, whether opposite-sex or same-sex, or married under common law, to have consistent federal family leave rights regardless of where they live.

**Commented [PM2R1]:** The DOL's final rule, listed above, was superseded by the Supreme Court's decision in Obergefell v. Hodges, June 26, 2015. The Supreme Court's decision in Obergefell dictated that employers in all states must now recognize same-sex marriage in any state when making FMLA spousal leave eligibility determinations.

I do understand the language in the CFR, but suggest we keep it simple. In practice, we take people at their word. We don't ask to see marriage certificates from anyone.

**Commented [PM3]:** Still accurate

who stood in loco parentis to an employee when the employee was a child. An employee's parents-in-law are not included in the definition of "parent" for purposes of FMLA leave.

d. Next of Kin of a Covered Service Member

"Next of kin of a covered service member" means the nearest blood relative other than the covered service member's spouse, parent, son, or daughter. This provision is only applicable for military family leave to care for a member of the armed forces with a serious injury or illness incurred in the line of duty. Proof of next of kin should be provided as required by law.

4. **Definition of "Serious Health Condition"**

For the purpose of this policy, a serious health condition is an illness, injury, impairment, or physical or mental condition that involves any of the following:

a. Physical or Mental Disability

A physical or mental disability means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR 1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq., define these terms.

b. Incapable of Self-care

Incapable of self-care is defined as requiring active assistance or supervision to provide daily self-care in three or more activities of daily living or instrumental activities of daily living. Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, and so forth.

c. Inpatient Care

Inpatient care refers to an overnight stay in a hospital, hospice, or residential medical-care facility, including any period of incapacity (i.e., inability to work, attend school, or perform other regular daily activities) or subsequent treatment in connection with such inpatient care; or

d. Continuing treatment by a health care provider, which includes any of the following five scenarios:

- (1) A period of incapacity lasting more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also includes treatment two or more times by or under the supervision of a health care provider (i.e., in-person visits, the first within 7 days and both within 30 days of the first day of incapacity); or one treatment by a health care provider (i.e., an in-person visit within 7 days of the first day of incapacity) with a continuing regimen of treatment (e.g., prescription medication, physical therapy).
- (2) Any period of incapacity related to pregnancy or for prenatal care. A visit to the health care provider is not necessary for each absence.
- (3) Any period of incapacity or treatment for a chronic serious health condition that continues over an extended period of time, requires periodic visits (at least twice a

year) to a health care provider, and may involve occasional episodes of incapacity. A visit to a health care provider is not necessary for each absence.

- (4) A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. Only supervision by a health care provider is required, rather than active treatment.
- (5) Any absences to receive multiple treatments for restorative surgery or for a condition that would likely result in a period of incapacity of more than three days if not treated.

#### 5. Exclusions from the Definition of Serious Health Conditions

Conditions for which cosmetic treatments are administered, such as most treatments for acne or plastic surgery, are not “serious health conditions” unless complications develop and inpatient hospital care is required.

Ordinarily, unless complications arise, the common cold, flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontic problems, periodontal disease, etc., do not meet the definition of serious health condition and do not qualify for FMLA leave.

#### 6. Intermittent or Reduced Work Schedule Leave

FMLA leave may be taken intermittently or on a reduced leave-schedule under certain circumstances. If an employee needs leave intermittently or a reduced schedule leave for planned medical treatment, the employee must make a reasonable effort to schedule the treatment so as not to unduly disrupt the employer's operations. In addition, employees are also expected to give reasonable notice before scheduled treatment. ~~Intermittent or reduced work schedule leave is not permitted after the birth, adoption, or placement of a child.~~

Examples of intermittent or reduced work schedule leave include:

- a. Medical appointments
- b. Chemotherapy
- c. Prenatal examinations
- d. Severe morning sickness
- e. Asthma attack
- f. Migraine headache

Employees may elect to take FMLA on an intermittent basis for the birth of a child or for placement with the employee of a child for adoption or foster care. Intermittent FMLA leave not taken for medical reasons is subject to the approval of the employee's supervisor. An employee's eligibility for intermittent leave for the birth of a child or for placement for adoption or foster care ends one year after birth or placement of the child.

#### 7. Military Leave

There are two types of military family leave available under the FMLA:

- a. Qualifying Exigency Leave

An employee who meets the eligibility requirements described above may be entitled to use up to 12 workweeks of his/her basic FMLA leave entitlement to address certain qualifying exigencies. Leave may be used because of any qualifying exigency arising out of the fact that the spouse, son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the National Guard or Reserves. Qualifying exigencies may include:

- (1) Short-notice deployment (up to 7 days of leave)
- (2) Attending certain military events
- (3) Arranging for alternative childcare
- (4) Addressing certain financial and legal arrangements
- (5) Periods of rest and recuperation for the service member (up to 15 calendar days of leave)
- (6) Attending certain counseling sessions
- (7) Attending post-deployment activities (available for up to 90 days after the termination of the covered service member's covered active duty status)
- (8) Other activities arising out of the service member's covered active duty or call to active duty and agreed upon by the company and the employee

b. Military Caregiver Leave

There is also a special leave entitlement that permits eligible employees to take up to 26 workweeks of FMLA leave during any single 12-month period if the employee is the spouse, son, daughter, parent, or next of kin caring for a covered military service member recovering from an injury or illness. When both husband and wife work for the state of Texas, the aggregate amount of leave that can be taken by the husband and wife to care for a covered service member is 26 workweeks in a single 12-month period. A covered service member is either:

- (1) A current member of the armed forces, including a member of the National Guard or Reserves, who is receiving medical treatment, recuperation, or therapy, or is in outpatient status, or is on the temporary disability retired list for a serious injury or illness.
- (2) A veteran of the armed forces (including the National Guard or Reserves) discharged within the five-year period before the family member first takes military caregiver leave to care for the veteran and who is undergoing medical treatment, recuperation, or

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**§825.126 Leave because of a qualifying exigency (a)**

(6) *Rest and Recuperation.* (i) To spend time with the military member who is on short-term, temporary, Rest and Recuperation leave during the period of deployment;

(ii) Leave taken for this purpose can be used for a period of 15 calendar days beginning on the date the military member commences each instance of Rest and Recuperation leave;

therapy for a qualifying serious injury or illness. A veteran who was dishonorably discharged does not meet the FMLA definition of a covered service member.

A “serious injury or illness” means:

- (a) For a current member of the armed forces (including a member of the National Guard or Reserves), an injury or illness that was incurred by a service member in the line of duty on active duty that may cause the service member to be medically unfit to perform the duties of his/her office, grade, rank, or rating. A serious injury or illness also includes injuries or illnesses that existed before the service member’s active duty and that were aggravated by service in the line of duty on active duty.
- (b) For a veteran, a serious injury or illness is one that rendered the veteran medically unfit to perform his/her military duties, or an injury or illness that qualifies the veteran for certain benefits from the Department of Veterans Affairs or substantially impairs the veteran’s ability to work. For veterans, it includes injuries or illnesses that were incurred or aggravated during military service but that did not manifest until after the veteran left active duty.

#### 8. Outside Employment and Other Activities

An employee who is on FMLA, including FMLA leave for workers’ compensation leave, is prohibited from attending work related educational and training classes, or performing work with an outside employer when the functions of that position are outside of the restrictions stated by the health care provider work related trainings, or performing work with an outside employer.

#### 9. Benefit Status during FMLA Leave without Pay

An employee will utilize sick and vacation leave eligible leave accruals while on FMLA. After all sick leave and vacation eligible leave accruals have been exhausted, the employee will go into be placed on a leave without pay status. Leave without pay status will be reported by the departmental representative by completing the appropriate documentation and forwarding it through the proper channels in order to meet payroll processing deadlines.

- a. Texas Tech TTU encourages an employee who is on approved FMLA leave, and goes into leave without pay status, to continue health benefits at the same level and conditions. Texas Tech TTU will continue employer contributions at the same level during such leave, provided any employee-paid premiums are kept current. The employee must pay premiums due, if any, to the Texas Tech Payroll Services, Box 41092, Lubbock, Texas, 79409-1092, or ERS as applicable.
- b. An employee who returns to work directly from unpaid FMLA leave may reinstate all reduced or canceled coverages that were in effect prior to going on FMLA leave, provided the employee contacts ERS or Human Resources within 30 days of returning. Such reinstatement will be effective the date the employee returns to work without penalty for pre-existing conditions and without the requirement to show evidence of insurability. In addition, employees may add newly eligible dependents to the group benefits plan within 30 days of the qualifying life event. If an employee does not reinstate coverage within 30 days of returning to work, the next opportunity will be during annual enrollment.

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We have had issues where EEs are on FML because the dept could not accommodate restrictions. EEs on FMLA might also have alternate employers that are able to accommodate restrictions due to the nature of the position. We also have EEs that are on FML for birth, adoption, etc., but also take classes online or during evenings.

**Commented [GS6]:** I removed this, because employees can use the following:

sick leave, vacation leave, sick leave Pool, donated sick leave, compensatory time (for those that have a compensatory time policy)

- c. If the department becomes aware, and verifies that an employee on approved FML does not intend to return to work at the conclusion of his/her leave, the employee's entitlement to leave under FMLA and employer-paid premiums will cease. The employee's department representative will be responsible for submitting an electronic personnel Action Form (ePAF) to separate employment. If it becomes known to and verified by the department during FMLA leave that the employee does not intend to return to work following FMLA leave, the entitlement to FMLA leave and employer-paid premiums cease at that time, and the employee shall be separated with an electronic Personnel Action Form (ePAF). Texas Tech TTU may recover from the employee any employer-paid premiums during any period of unpaid FML from the employee A leave if the employee does not return to work at the conclusion of an approved family or medical leave FML.
- d. An employee on FMLA leave is not entitled to accrue state service credit for any full calendar month(s) of FMLA leave without pay and shall not accrue vacation or sick leave for such months.

#### 10. Parental Leave

A state employee who has been employed for fewer than 12 months by the state or has worked fewer than 1,250 hours during the 12-month period preceding the beginning of leave is eligible to take a parental leave of absence not to exceed 12 workweeks. If an employee becomes eligible for FMLA leave while out on parental leave, the employee will receive only a combined total of 12 workweeks.

- a. The employee must exhaust all available and applicable sick and vacation leave. After all sick and vacation leave has been exhausted, the remainder of the leave is unpaid.
- b. The leave authorized by this section is limited to, and begins on the date of, the birth of a natural child of the employee or the adoption or foster care placement with the employee of a child younger than three years of age.
- b-c. An employee may elect to take parental leave on an intermittent basis for the birth of a child or for placement with the employee of a child younger than three years of age for adoption or foster care, subject to the approval of the employee's supervisor. An employee's eligibility for intermittent parental leave for the birth of a child or for the adoption or foster care placement of a child younger than three years of age ends one year after birth or placement of the child.

An employee on parental leave is not entitled to receive the state-paid portion of the group health insurance premium during any full calendar months of leave without pay. The employee is responsible for the entire cost of the insurance premiums.

#### 11. Concurrent Paid Leave

The employee is required to first use all available and applicable sick and vacation leave accruals while taking FMLA leave, except for certain circumstances regarding employees receiving temporary disability benefits and workers' compensation benefits. The use of sick and vacation leave accruals runs concurrent with FMLA leave. The employee is required to report leave using the electronic leave reporting system in accordance with OP 70.44, Sick Leave and Sick Leave Pool, and OP 70.45, Vacation Leave. After the employee has exhausted all eligible accrued leave, the employee will go into a leave without pay status.

#### 12. Misrepresenting Reasons for Leave

Intentionally misrepresenting the reasons for requesting family and medical leave may lead to

**Commented [GS7]:** Suggestions for rewording this paragraph:

If the department becomes aware, and verifies that an employee on approved FML does not intend to return to work at the conclusion of his/her leave, the employee's entitlement to leave under the FMLA and employer-paid premiums will cease. The employee's department representative will be responsible for submitting an electronic Personnel Action Form (ePAF) to separate employment.

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**Commented [GS8]:** Or we could add in:

Sick leave, vacation leave, SLP, donated leave, compensatory time.

### 13. Procedures

#### a. Employee Responsibilities - Notice of Leave

- (1) An employee is required to notify her/his supervisor of any events that require an extended absence from work. ~~An FMLA eligible e~~Employees must provide his/her supervisor ~~with~~ 30 days' advanced notice when the leave is foreseeable. When 30 days' notice is not practicable, the employee must provide notice as soon as practicable (within 2 business days if feasible), and follow the normal departmental call-in procedures.
- (2) An individual undergoing planned treatment or doctor appointments is required to consult with her/his supervisor and make a reasonable effort to schedule the treatment to minimize disruptions to the department's operations. If need for leave is not foreseeable, the employee must request it as soon as practicable, no later than two business days after the need for leave arises.

(3) An employee on intermittent leave must follow departmental call-in procedures when taking leave.

~~(3)(4)~~ An employee requesting to use intermittent FMLA or parental leave for birth, adoption, or placement of a child for foster care must receive the immediate supervisor's approval prior to beginning intermittent leave. A copy of the approval must be provided to the Human Resources FMLA manager.

~~(4)(5)~~ An employee has 30 days from the qualifying event to enroll newly eligible dependents in the group benefits plan.

#### b. Employer Responsibilities- Response to Leave Notice

- (1) If an employee notifies a supervisor about a condition that may qualify under the FMLA or parental leave, it is the supervisor's responsibility to refer the employee to Human Resources to determine eligibility for FMLA or parental leave. In addition, the supervisor should notify Human Resources when an employee has notified the supervisor of a qualifying FMLA or parental leave absence.
- (2) When an employee requests leave, the employee will be informed whether he or she is eligible for leave under the FMLA. If the employee is eligible for leave under the FMLA ~~leave~~, the employee will be given a written notice that includes details on any additional information he or she will be required to provide. If the employee is not eligible for leave under the FMLA, the employee will be provided ~~with~~ a written notice indicating the reason for ineligibility.
- (3) If leave will be designated as leave under the FMLA, the employee will be informed in writing and provided information on the amount of leave that will be counted against the employee's entitlement.

#### c. Medical Certification

- (1) If leave is requested because of the employee's own or a family member's serious health condition, the employee must submit appropriate medical certification to Human Resources from a health care provider to support the request for leave. The employee will be informed of the requirement for medical certification and when it is due (no more than 15 calendar days after leave is requested). The employee is responsible for



submitting the required documentation on (or before) the due date given by Human Resources.

- (2) The medical certification must include the date on which the condition began and its probable duration. It is the responsibility of the employee, not ~~Texas Tech~~TTU or the health care provider, to ~~see-ensure that~~ the required medical certification is ~~received-submitted by~~ to Human Resources. Failure to provide requested medical certification in a timely manner may result in denial of leave until it is provided.
- (3) ~~Texas Tech~~TTU, at its discretion, may also require a second opinion or third opinion regarding certification of a serious health condition at the expense of ~~Texas Tech~~the employer. If a third medical opinion is sought, the health care provider selected must be mutually acceptable to the employee and ~~Texas Tech~~TTU. The third opinion will be the final opinion, and the opinion rendered will be binding on both the employee and ~~Texas Tech~~TTU.
- (4) All certifications ~~received by Human Resources should~~will be treated as confidential medical records and kept separate from personnel records in a locked or secured area.

d. Adoption of a Child and Foster Care

For adoption of a child or foster care placement, the employee must submit an FMLA application and the Adoption or Foster Care Placement Certification at least 30 days in advance if the leave is foreseeable. In cases in which the leave is unforeseeable, the documentation must be submitted in as much notice as practicable (within 2 business days).

e. Reporting While on Leave

If an employee takes leave because of the employee's own serious health condition or to care for a covered relation, the employee must contact his/her supervisor at least every two weeks (or as instructed by the department) regarding the status of his/her leave and intention to return to work. If the employee fails to contact his/her supervisor to report his/her status, the employee may be contacted by TTU for this purpose. A family member may call in for the employee only if the employee is medically unable to do so. In addition, the employee must give notice as soon as practicable (within 2 business days, if feasible) if the dates of the leave change, are extended, or were unknown initially and provide supporting medical documentation.

f. Returning to Work

- (1) Prior to returning to work from FMLA due to his/her own serious medical condition, an employee is required to present medical certification of fitness-for-duty indicating that the employee is able to resume work. Failure to provide a medical certificate of fitness for duty may result in a denial of job reinstatement until a medical certificate release is provided.
- (2) An employee who returns to work from ~~family or medical leave~~FML of absence, except for certain highly compensated employees, will be returned to his/her same job or an equivalent position subject to the rules of ~~the~~ FMLA. Failure to return to work at the conclusion of FMLA without notifying the employing department and Human Resources will be considered job abandonment and may result in termination.
- (3) A highly compensated and key employee may not be returned to his/her former or equivalent position following a leave if restoration of employment will cause

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substantial economic injury to the university. This fact-specific determination will be made by ~~Texas Tech University~~ TTU on a case-by-case basis. The employee will be notified if he/she qualifies as a “highly compensated and key employee” if ~~Texas Tech~~ TTU intends to deny reinstatement, and of employee’s rights in such instances.

#### 14. Documenting Relationships

For purposes of confirmation of family relationship, ~~Texas Tech~~TTU may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, a child's birth certificate, a court document, etc. ~~Texas Tech~~TTU is entitled to examine documentation such as a birth certificate, but the employee is entitled to the return of the official document submitted for this purpose.

#### 15. Right to Change Policy

Texas Tech reserves the right to interpret, change, modify, amend, or rescind this policy, in whole or in part, at any time without the consent of employees.

#### 16. Conflict between Policy and Law

In the event of a conflict between this OP and either federal or state law, the law will prevail.

#### 17. Authoritative References

The Family and Medical Leave Act (FMLA), 29 U.S.C., Sections 2601 et seq.  
29 CFR, Chapter 825, Family and Medical Leave Act of 1993  
Texas Government Code, Sections 661.912 and 661.913  
Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA)  
The Family and Medical Leave Act of 1993 as Amended

All related forms are available on the Human Resources website:  
<http://www.depts.ttu.edu/hradministration/hrservices>

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## Family and Medical Leave (FMLA) Tracking Timelines for 9-month Faculty

Faculty members who are on a 9-month appointment will only report FMLA absences covering periods for which they are required to be on duty. [Faculty members appointed on a less than 12-month basis observe the student holiday schedule.](#)

Since 9-month faculty appointments begin on September 1 of each year, faculty who are on FMLA at the beginning of the fall semester will begin reporting FMLA on September 1.

9-month faculty members will report FMLA absences for the following periods:

### Fall semester:

- FMLA reporting begins on September 1.
- FMLA reporting ends on the last day of commencement.
- FMLA will not be reported for the period between the last day of commencement and the first day faculty are required on duty for the spring semester.

### Spring semester:

- FMLA reporting begins on the date faculty are to report for duty.
- FMLA reporting will not be required during spring vacation.
- FMLA reporting will resume the Monday following spring vacation.
- FMLA reporting will end on May 31 of each year (the date 9-month appointments end).

Faculty members on 9-month appointments who are on FMLA at the end of the spring semester will not report nor be charged FMLA leave days during the summer semester. If the faculty member is not able to return to work at the beginning of the fall semester (September 1), FMLA will resume at that time.

The Annual Academic Calendar will be used to determine the exact dates for FMLA tracking.

