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# Family and Medical Leave for USPSCs

A Mandatory Reference for ADS Chapter 309

New Edition Date: 02/05/2021  
Responsible Office: M/OAA/P  
File Name: 309ma\_020521

As authorized by [AIDAR Appendix D](#), section 12, contract clause #5, Leave and Holidays, paragraph (i) on Family and Medical Leave, this mandatory reference provides the policies and procedures for implementing USAID's Family and Medical Leave (FML) program for U. S. Personal Services Contractors (USPSCs).

## **1. Entitlement to FML**

The Family and Medical Leave Act (FMLA) was enacted in 1993, and later amended, to allow employees to balance work and family life by protecting their employment and benefits status when taking reasonable leave for medical reasons, including child birth, adoption or care, or care for a spouse, parent or oneself in the event of a serious health condition.

Title I of the Family Medical and Leave Act applies to USPSCs working within the U.S. As a matter of policy and to maintain consistency, USAID is extending family and medical leave to USPSCs working outside the U.S. The Department of Labor, not Office of Personnel Management (OPM), is responsible for implementing regulations for FMLA Title I. The Department of Labor has issued regulations that implement FMLA Title I at [29 CFR Part 825](#).

Under FMLA Title I, an "eligible employee" is defined as an employee who has been employed:

- For at least 12 months by the employer with respect to whom leave is requested; and
- For at least 1,250 hours of service with such employer during the previous 12-month period.

As such, a USPSC who has been working for USAID for at least a total of 12 months and who has performed work in on-duty status amounting to at least 1,250 hours during the previous 12 months immediately preceding the leave will be eligible for this coverage. [29 CFR 825.110\(b\)](#) states that the 12 months an employee must have been employed by the employer need not be consecutive months; it allows for separations or other breaks in service of up to seven years. Under limited circumstances – military service or union agreement allowing re-employment – a break in service of more than seven years is allowed to be counted.

In accordance with [29 CFR 825.200\(a\)](#), an eligible USPSC may take leave under FMLA Title I for the following reasons:

- a. The care of the USPSC's newborn child.
- b. The care of the USPSC's newly placed adopted or foster care child.
- c. The care of the USPSC's spouse, child, or parent with a serious health condition.
- d. The USPSC's own serious health condition.

- e. A qualifying exigency arising from the USPSC's spouse, child, or parent in active duty military status.
- f. Other qualifying exigencies as determined by the Department of Labor.

Consistent with [29 CFR 825.200](#), the 12-month period in which the 12 workweeks of leave entitlement occurs is based on the 12-month period measured forward from the first date when the USPSC's FMLA leave begins. Except in the case of care for a covered service member with a serious injury or illness, the USPSC's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the above-listed reasons.

As stated in 29 CFR 825.200(h), for purposes of determining the amount of leave used by a USPSC, the fact that a holiday may occur within a workweek taken as FMLA leave has no effect; the workweek is counted as a workweek of FMLA leave. However, if the USPSC is using FMLA in increments of less than one workweek, the holiday will not count against the USPSC's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday.

For details of the FMLA's provisions and information concerning the procedures for filing complaints of violations of the Act with the Department of Labor's Wage and Hour Division, see [WHD Publication 1420](#).

## **2. Duration of Family and Medical Leave**

The USPSC's supervisor must authorize only the amount of FMLA that is necessary to manage the circumstances that prompted the need for the leave. FMLA is not authorized for any period beyond the completion date of the USPSC award.

## **3. FMLA LWOP and Substitution of Paid Leave**

In accordance with [29 CFR 825.207](#), generally FMLA leave is unpaid leave. However, the USPSC may choose to substitute leave without pay (LWOP) with accrued paid leave, including accrued annual or sick leave, or compensatory time earned under the contract. If the USPSC does not choose to substitute accrued paid leave, the CO, in consultation with the USPSC's supervisor, may require the USPSC to substitute accrued paid leave for FMLA LWOP. The CO must verify the accuracy of the USPSC's accrued paid leave request and obtain the required certifications for approval of FMLA in accordance with this USAID policy.

## **4. Notice of Intent to Invoke Entitlement to FMLA**

- a. The USPSC's supervisor must confirm that the USPSC meets FMLA eligibility requirements as follows:

- 1) As of the date on which any FMLA is to commence, the USPSC must have been under a personal services contract for work with USAID for a total of

at least 12 months within the previous seven years, unless a break in service and period of absence from work is due to, or necessitated by, the USPSC's fulfillment of a service obligation covered under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, et seq. Such USERRA-covered service must be counted in determining whether the USPSC has been under contract for work with USAID for at least 12 months. Note however that USAID's FML does not provide any greater entitlement than may be available to the USPSC under the USERRA.

- 2) As of the date on which any FML is to commence, the USPSC must have met the hours of service requirement by having been employed under a USAID personal service contract for at least 1,250 hours during the immediately previous 12-month period, except that:
  - A USPSC returning from fulfilling his or her USERRA-covered service obligation must be credited with the hours of service that would have been performed, but for the period of absence from work due to or necessitated by USERRA-covered service in determining whether the USPSC met the hours of service requirement; and
  - To determine the hours that would have been worked during the period of absence from work due to or necessitated by USERRA-covered service, the USPSC's pre-service work schedule can generally be used for calculations (see [29 CFR 825.110\(c\)\(2\)-\(3\)](#) for additional details).
- b. When the USPSC invokes the intent to take FML, the USPSC's supervisor must adhere to the notification and certification requirements detailed in section 4 of this policy, as well as sections 5 and 6. The USPSC must meet the eligibility requirements and comply with the requirements and obligations of this guidance.
- c. When the USPSC intends to take FML, the USPSC must complete a [Family and Medical Leave Application Request, Form AID 481-1](#). The USPSC's supervisor must review the information and confirm that the request meets USAID's FML requirements.
- d. The approved application form, medical certificate, and other related documents must be retained in the USPSC's contract file.
- e. Foreseeable and Unforeseeable FML:
  - 1) If the need for family and medical leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment, the USPSC must provide not less than 30 days' notice of the USPSC's intent to take FML, before the date the leave is to begin. If the date of birth or placement or planned medical treatment requires leave to

begin within 30 days, the USPSC must provide such notice as soon as is practicable.

- 2) If the need for leave is foreseeable and the USPSC fails to give 30 days' notice with no reasonable excuse for the delay of notification, the Agency has the right to delay the taking of family and medical leave until at least 30 days after the date the USPSC provides official notice of intent to take FML.
- 3) If the need for family and medical leave is unforeseeable for such reasons as a medical emergency or the unexpected availability of a child for adoption or foster care, and the USPSC cannot provide 30 days advance notice, the USPSC or personal representative (e.g., a family member) must provide notice within a reasonable period of time appropriate to the circumstances involved. (Note: If a USPSC and the USPSC's personal representative are physically or mentally incapable of invoking the USPSC's entitlement to FMLA leave during the entire period in which the USPSC is absent from work for an FMLA-qualifying purpose, the USPSC may retroactively invoke the entitlement to FMLA leave within a reasonable period after returning to work. In such cases, the incapacity of the USPSC must be documented by a written medical certification from a health care provider. In addition, the USPSC must provide a brief memo to the USPSC's supervisor explaining that the USPSC's personal representative was unable or was unaware of the requirement to contact the agency and invoke the USPSC's entitlement to FMLA leave during the entire period in which the USPSC was absent from work for an FMLA-qualifying purpose.)

## **5. Intermittent Leave or Reduced Leave Schedule**

A USPSC may take FML on an intermittent basis or on a reduced leave schedule under certain circumstances in accordance with [29 CFR 825.202](#) and [203](#). All intermittent or reduced schedule leave is subject to the limits on the duration of FML under section 2 of this policy.

## **6. Certification for Birth, Adoption, or Foster Care**

The USPSC's supervisor must obtain the USPSC's certificate or other administratively acceptable evidence in support of the [Family and Medical Leave Application Request, Form AID 481-1](#) for the birth of a child or placement of a child for adoption or foster care.

## **7. Medical Certification**

When a USPSC requests FML for the USPSC's own serious health condition, or for care of an eligible family member with a serious health condition, the USPSC's supervisor must obtain a written medical certification issued by the USPSC's health

care provider or the health care provider of the eligible family member as appropriate, using the [Family and Medical Leave Application Request, Form AID 481-1](#)

The USPSC may use the U.S. Department of Labor [Form WH-380E, Certification of Health Care Provider for Employee's Serious Health Condition](#), and [WH-380F, Certification of Health Care Provider for Family Member's Serious Health Condition](#) to obtain written medical certification. The USPSC's supervisor may also accept a statement from the USPSC's health care provider as a substitute for the forms as long as the statement contains the same basic information. In all instances, the information on the forms must relate only to the serious health condition for which the current need for leave exists.

For family and medical leave for a USPSC with a serious health condition, the health care provider's statement must confirm that the USPSC is unable to perform the essential functions of the USPSC's position. Note: The statement of the essential functions of the USPSC's position is based on written information provided by the USPSC's supervisor or, if not provided, on discussion between the health care provider and the USPSC.

For family and medical leave for the care of an eligible family member with a serious health condition, the following is also required:

- a. A statement from the health care provider that the eligible family member requires psychological comfort and/or physical care; needs assistance for basic medical, hygienic, nutritional, safety, or transportation needs or in making arrangements to meet such needs; and would benefit from the USPSC's care or presence;
- b. A statement from the USPSC on the care the USPSC will provide and an estimate of the amount of time needed to care for the eligible family member; and
- c. Medical certification for intermittent leave or leave on a reduced leave schedule to care for a family member or to receive medical care must include the dates on which such treatment is expected to be given and the duration such treatment is required.

All medical information must be protected under the provisions of the Privacy Act (see [ADS 508, Privacy Program](#)) and released only to those who have a need to know.

## **7.1 Second Opinion**

A USPSC's supervisor has the right to request that the USPSC obtain an opinion of a second health care provider, subject to approval by the Agency, in cases where the validity of the original medical certification concerning the USPSC or a family member is questioned or doubted. The Agency will reimburse the USPSC, upon submission of written proof of payment, for the cost of obtaining a second opinion.

## **7.2 Third Opinion**

If the opinion of the second health care provider differs from the original certification, the supervisor has the right to require, at Agency expense, that the contractor obtain the opinion of a third health care provider designated or approved jointly by the Agency and the contractor. The opinion of the third health care provider must be binding on the Agency and the contractor.

### **7.3 Medical Recertification**

While a USPSC is on family and medical leave, the USPSC's supervisor has the right to obtain from the USPSC subsequent medical recertification on a periodic basis, not more often than every 30 calendar days. However, the USPSC's supervisor has the right to require more frequent medical recertification if the USPSC requests that the original leave period be extended; the circumstances described in the original medical certification have changed significantly; or if the Agency receives information that casts doubt upon the continuing validity of the medical certification. The Agency will reimburse a USPSC, upon submittal of written proof of payment, for the cost of the medical recertification.

### **7.4 Medical Certification to Return to Work**

If a USPSC subject to a medical evaluation program (overseas USPSCs) is approved for leave because of a serious health condition that renders the USPSC unable to perform the essential functions of the USPSC's position, that USPSC will be required to provide written medical certification from the health care provider that the USPSC is able to perform these functions prior to return to duty. USPSCs will be informed of this requirement before FML commences, or to the extent practicable in emergency medical situations. The Agency will reimburse a USPSC, upon submission of written proof of payment, for the cost of the required medical certification.

## **8. Protection of Employment and Benefits**

When the eligible USPSC takes FML during the period of performance of the USPSC contract, the USPSC is entitled, upon return to contract performance, to be restored to the same USPSC position held by the USPSC when the leave commenced provided that the contract period of performance has not expired. Leave under FML and the entitlement to return to the position must not, and cannot, exceed the completion date of the contract in accordance with the funding limitations under [FAR 43.105](#).

## **9. Continuation of Health Benefits**

A USPSC who takes LWOP under FML will have the option to continue their health insurance enrollment by agreeing to pay 100 percent of the premium cost for the time that they are on unpaid leave. Such payment can be made either during the time of unpaid leave or upon returning to duty. The USPSC award requires the USPSC to contact their health insurance provider about continuing coverage under FML status.

Note: The USPSC's supervisor must ensure that if the USPSC elects LWOP FML, the USPSC indicates on the [Family and Medical Leave Application Request, Form AID 481-1](#) whether or not the USPSC will continue health insurance coverage while the USPSC is in LWOP status. The USPSC's supervisor must strike the term "health benefit" and substitute "insurance coverage" on this form.

## **10. Contract File Record**

The USPSC's supervisor must provide a log to the Contracting Officer for the contract file to track and record the use of leave under this FML policy.

## **11. Mandatory Forms**

- a. [AID 481-1 \(Family and Medical Leave Request Application\)](#)
- b. [WH-380E, Certification of Health Care Provider for Employee's Serious Health Condition](#)
- c. [WH380F, Certification of Health Care Provider for Family Member's Serious Health Condition](#)

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