

**SUMMARY OF SICK AND FAMILY LEAVE UNDER THE
VSEA/EXECUTIVE BRANCH CONTRACTS AND LAW**

September 18, 2018

I. What are my rights to take leave for illness, injury, a new child, or to care for a family member?

There are several overlapping laws and contract provisions that apply to medical, family or parental leaves of absence. While this fact sheet will focus on the FMLA and related contract articles, it is important to have some understanding of the other rights that may apply. Here is a quick summary:

- a. Workers' Compensation:** If you are unable to work (either partially or completely) due to a work related injury, your most important rights to pay and leave will be determined by the workers' compensation laws.
- b. Family Medical Leave Act or the Vermont Family and Parental Leave Act:** these statutes guarantee most employees 12 weeks of unpaid leave per year for your own or for a family member's serious illness, or for the birth or adoption of a new child. The details are discussed further below. The laws only provide unpaid leave, but permit the employer to count any paid leave used by the employee towards the 12 week cap.
- c. Americans With Disabilities Act or Vermont Fair Employment Practices Act:** if you suffer from a protected disability that requires you to miss work, you may have additional rights to take unpaid leave as an accommodation, if you can otherwise perform the essential functions of a job. This right may be important if you run out of FMLA and/sick leave.
- d. Sick Leave Article:** The Sick Leave Article of the contract is one of the most important benefits VSEA members have won at the bargaining table. This article is discussed more fully below, but it guarantees paid leave time to recover from an illness or injury. If you have the leave time on the books, the State is required to let you use it.
- e. Parental and Family Leave Article:** This article largely mirrors the federal and state family and parental leave articles, and either incorporates or protects rights found elsewhere in the contract. It is discussed more fully below.
- e. Unpaid leave:** The contract gives employees some additional rights to request an unpaid leaves of absence above and beyond the rights and benefits guaranteed elsewhere under the contract or the law. This may be important if you have exhausted your paid leave and 12 weeks FMLA leave, but still need some time before you can return to work. The State has significant discretion to deny requests for unpaid leaves.
- f. Annual, personal and compensatory time:** These forms of accrued paid leave may be used to supplement paid sick time, if needed. Employees can no longer be forced to use these forms of earned time for their own illness if they have sick leave on the books. The contract does permit the employer to

force employees to use other earned time after 6 weeks to cover family illnesses or parental leave. Since any balance in these kinds of leave is paid out upon separation, you should normally use sick leave first if at all possible.

g. Leave Banks: The Sick Leave article of the contract permits employees to create a sick leave bank to help a co-worker who has run out of leave and faces long-term periods of incapacity. Only annual leave may be donated.

II. What are my rights under the Sick Leave Article?

a. What can I use sick leave for?

The Sick Leave Article gives employees the right to accrue sick days at a set accrual rate each pay period. Accumulated sick leave may be used to provide paid leave time when:

1. the employee is “absent from work and unable to perform his or her duties because of illness, injury, or quarantine for contagious disease;”
2. for “medical and dental appointments which cannot be made outside the employee’s normal working hours;” or
3. for illness or injury of the employee, or for the death or illness of a member of the employee’s immediate family.

b. What do I need to tell my employer?

The Sick Leave article requires prompt notice of the illness or injury. The State may request “with sufficient reason” a certificate from a physician “or other evidence” in order to:

1. Justify the approval of sick leave or
2. Show ability to return to work.

The requirement to provide medical evidence may extend for 6 months, subject to extension, but only “with sufficient reason.” In cases of extended absence, the employer is permitted to ask for periodic updates.

c. Can the State limit how much of my sick leave I accumulate or use?

There is no limit on the amount of sick leave that may be accumulated. The Sick Leave Article does not limit the amount that can be used for the individual’s own sickness or injury, but only guarantees 10 days of sick leave to care for a sick family member. The Vermont Supreme Court has ruled that the Parental/Family Leave Article does not diminish an employees’ right to use unlimited sick leave for his or her own injury or illness. If the employee is claiming time to care for a family member, , the contract permits the use of sick leave for 6 weeks, but then requires employees to exhaust other forms of leave before claiming additional sick time.

d. What happens if I run out of sick leave but still need time off?

A sick or injured employee who exhausts his or her sick leave may have additional rights:

1. To use annual or other accumulated leave pursuant to the applicable contract articles and/or the Parental Leave/Family Leave Article.
2. To request access to a sick leave bank under the Sick Leave Article.
3. To request an unpaid leave of absence under Off Payroll/Administrative Leave Article.

III. What are my rights under the Parental Leave/Family Leave Article, Federal Family Medical Leave Act, Vermont Parental and Family Leave Act?

a. What are my basic rights?

The Parental Leave/Family Leave Article was negotiated in 1999 with the goal of tracking and consolidating the rules set out in the federal and state statutes and contract articles. The VLRB and the Supreme Court have ruled that the Parental Leave/Family Leave article cannot diminish the rights provided in the Sick Leave article or any other provision in the contract.

The state and federal laws guarantee a minimum of 12 weeks per year of unpaid leave for:

1. The employee's own serious illness
2. Care of a seriously ill family member
3. Parental Leave for the birth or adoption of a child.

During that time, the employer must maintain the benefits and cannot dismiss the employee for failing to report to work. The State uses a rolling year for calculating the use of this benefit. For example, if you first claimed or were granted FMLA leave on May 1, 2017, you can use up to 12 weeks of FMLA leave until April 30, 2018, and then another 12 weeks the year after.

FMLA leave may be used intermittently or in blocks of time.

b. What is a "serious illness"?

The FMLA defines a "serious illness" to be an illness, injury, impairment or physical or mental condition that requires either:

1. Inpatient care at a hospital, hospice or residential medical care facility, or
2. Continuing treatment by a health care provider.

The Vermont PFLA defines a serious illness to include an accident, disease or physical or mental condition that:

1. poses immediate danger of death;
2. requires inpatient care in a hospital; or
3. requires continuing in-home care under the direction of a physician

c. Can the State force me to use FMLA leave?

The State is permitted to “designate” any sick or other medical leave time used for a “serious illness” as counting towards the 12 weeks minimum. This means that an employee may request only sick leave for an absence without requesting FMLA leave. If the illness qualified as serious, however, the state can start the clock running on the 12 week minimum.

d. Can I extend my leave time by using my sick leave first, then using FMLA leave?

In no instance may an employee exhaust sick or annual leave for a serious illness, then afterwards take an additional 12 weeks of FMLA or PFLA leave to extend the time out.

e. What information do I need to give my employer?

Where the employee requests leave under the statutes or this article, the State insists on receiving far more detailed medical information than is generally required for sick leave. The State will insist that the employee have his or her doctor complete a detailed form, providing information about the medical condition. The employer is entitled to determine whether the employee will be incapacitated, and whether the condition qualifies as a serious medical condition under the act. In some cases, the state has requested information that is intrusive and goes beyond what it is entitled to receive by law. Also, the employer’s right to additional information only extends where the employee is requesting benefits under this Article, not to every situation where an employee requests sick leave.

III. What are my parental leave rights?

The employee may take up to 12 weeks under the FMLA or 4 months under the Executive Branch contracts for parental leave for childbirth, pregnancy or adoption. The statutes only guarantee unpaid leave, so any paid leave is provided by contract. He or she may use up to 6 weeks of sick or other accrued leave, if accumulated, to cover the first six weeks of absence. After the initial six weeks, he or she must use compensatory, personal or annual leave, in that order, before using any more sick leave.

The State takes the position that parental leave must be taken immediately and must be used in one continuous period, so an employee loses the leave if he or she returns to work at all. VSEA disagrees with this interpretation and may challenge it in an appropriate case.

Childbirth may obviously entail a combination of the mother’s medical incapacity, time to care for a serious medical condition suffered by a newborn child, and a period of parental leave once any

serious medical issues are resolved. The total leave for that employee is limited to 12 weeks per year. Parental leave is available to fathers and mothers equally.

IV. What are my leave rights if I adopt a child or a child is placed with my in foster care?

The same principles apply to adoption, but the leave must be used during the first year after placement of the child for:

- a. adoption under the Vermont statute or the contracts, or
- b. under the FMLA, after adoption or placement in foster care.

The state and VSEA are currently in a dispute over whether this year is triggered by a prior foster care placement that was not “for the purpose of adoption”. We interpret the statute to require the employer to apply the law or contract provision that is most beneficial to the employee.

V. What are my rights to take leave to care for a sick family member?

The FMLA and the Vermont PFLA guarantee a minimum of 12 weeks of unpaid leave to care for a family member with a serious illness, and that leave may be taken intermittently. The leave will be subject to similar requirements for notice to the employer.

a. Can the State limit my use of sick leave during a leave to care for a family member?

Leave for the care of an ill family member is limited to 12 weeks. The employee may use sick or other accumulated leave for the first 6 weeks. After that, the employee must use compensatory, personal or annual leave, in that order, before using any more sick leave. Leave to care for an ill family member may be used intermittently.

VI. How does the State administer these leave provisions?

a. What do I do when I first get sick?

The first step is to tell your supervisor, as promptly as possible. The State will ask you to fill out additional paperwork if you ask for FMLA leave, or if the State believes your leave is covered by the FMLA. The State insists that you complete FMLA paperwork for leave to recover from a serious illness or injury, to care for a family member, or for parental leave following birth or adoption. The paperwork asks you for some basic facts about the reasons for the leave, and then includes a portion that needs to be completed by your treating medical provider.

In most cases, this process is straightforward. If you need time for a hip replacement or you’re expecting a child, the employer has the right to know those basic facts in order to properly administer the leave system. The inquiry is more intrusive than when you call in with the flu, but it may only require one certification instead of permitting the employer to demand new doctor’s notes every time you are sick.

If the issue is particularly sensitive, however, there are steps we can take to limit either the information that is provided to the employer, or who on the employer side can see the information provided. For example, an employee was asked to complete FMLA paperwork when he went home for a couple of days due to stress, and the state tried to pry into his psychiatric history. We were able to push back and protect his privacy.

b. Can the State refuse paid sick leave in order to force me to provide medical documentation?

In some cases, the State has refused to approve requests for simple sick leave because it says the information provided doesn't satisfy the FMLA standards. That may be a violation of the contract, and in some cases it may make sense to file a grievance. In VSEA's view, a valid request for sick leave must be honored by the State. The state should approve the paid sick leave and then work out whether the FMLA applies. At worst, an employee who doesn't provide the requested information may be unable to claim the additional protections of the federal and state laws.

c. What happens when I run out of leave?

If you are running out of paid leave or unpaid FMLA leave, it is important to plan ahead. The State may send you a letter notifying you of your leave balance, and outlining some options. Those may include requesting an extended unpaid medical leave. Another question will be whether your condition qualifies as a protected disability under the ADA, and whether you should request additional leave as an accommodation.