



Representing Wayne State Faculty and Academic Staff

# NEWSBRIEFS

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## Family/Medical Leave: Know Your Rights!

By Michelle Fecteau, Executive Director, AAUP-AFT

Many of us will someday confront the need to take a leave from our job. You may become seriously ill. Or your newborn or adopted child will need your attention. Or a family member will be counting on your care. What rights do you have?

The first thing some WSU administrators will tell you is that your only recourse is to apply for unpaid leave under the terms of the Family Medical Leave Act (FMLA). This process includes submitting medical information to a third-party administrator in Chicago. While the FMLA does, in fact, protect your right to take such a leave, it is not your only recourse. In many cases you have rights under our collective bargaining agreement that are superior to those protected under the FMLA.

### The Family and Medical Leave Act

Signed by President Clinton in 1993, the FMLA entitles eligible employees to time off when managing serious health issues for themselves or an immediate family member. Proponents of the law were particularly concerned with the growing number of working women who had to juggle the conflicting demands of family and work life. Time-off related to pregnancy and adoption became a focal point of the rights protected under the Act, including the right of fathers to take paternity leave.

Under FMLA, both public- and private-sector workplaces with more than 50 people on payroll are legally required to provide up to 12 weeks of unpaid leave per year to employees who need to care for a family member who is ill or to address their own

medical issues, including maternity/paternity leave. Leave time can be broken down into one-day or even one-hour increments. During such an FMLA leave, employees can use their rights under our collective bargaining agreement to apply for certain kinds of compensation—like short-term disability or vacation benefits—which our contract provides.

The Act also protects your right to return to your previous job (or an equivalent one) at the end of your FMLA leave, and protects those who exercise their rights under the Act from

any form of employer retaliation, including formal discipline, non-renewals, negative evaluations, or denial of a promotion. These protections apply to all employees, union or non-represented, who work more than 1250 hours per year.

The FMLA has had a contentious history that shapes its current administration. It was debated for eight years, voted on 13 times in Congress, vetoed twice by President George H.W. Bush, and finally passed by President Clinton a month after he took office.

*“Many administrators recognize the FMLA’s positive contribution to employee morale and health. Unfortunately, there are some who see it as an opportunity to undermine the contractual rights of our members.”*

The regulations developed under the Clinton Administration were viewed by some employer organizations as beyond the scope of the statute passed by Congress and overly generous to employees. Once George W. Bush became president in 2001, groups like the U.S. Chamber of Commerce, the Society of Human Resource Management and the misnamed National Coalition to Protect Family Leave lobbied to reduce FMLA benefits and protections. Before Bush left office in November 2008, the regulations were revised, although not as drastically as employer organizations would have liked.

### The Collective Bargaining Agreement

Many of the provisions in our collective bargaining agreement are more generous than the FMLA, and in all such cases the law says very clearly that the terms of our contract prevail.

Section 2652 of the FMLA states:

“Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.”

Union-represented employees are further protected by state labor law, which prohibits employers from unilaterally changing established benefits under the guise of implementing a “new FMLA policy.” All benefit changes have to be negotiated, and FMLA rights cannot be diminished by any such negotiations. (Non-union workers cannot negotiate benefits, but their FMLA rights cannot be nullified by any management-initiated benefit program or plan.)

Unlike the 12 *weeks* of unpaid leave provided for under FMLA, our collective bargaining agreement (Article XIII A, pages 34-36) provides for

unpaid leave of up to 12 *months* for personal reasons including illness. Moreover, there is provision in our contract (Article XIII C, pages 41-43) for a short-term disability benefit that provides for a *paid* leave of up to six months per year. New hires are eligible for one month of short-term disability pay, and with each year on the job the leave increases by another month, maxing out at 6 months. Subsidized healthcare benefits also continue during such a leave.

There is also a long-term disability insurance benefit which can provide payments until age 65, or— if disabled after turning 60— for five years or until age 70, whichever is less. (See Article XII G, pages 27-28.)

*“We submitted a detailed report to Human Resources outlining the several ways in which the new policy violated FMLA regulations, the contract, and state labor laws. To HR’s credit, the policies were reviewed and largely corrected.”*

Unlike the FMLA, which requires that a certification form be completed by a health care provider and submitted within 15 days to a 3<sup>rd</sup> party administrator in Chicago, our contract (Article XIII E, page 47) simply requires the employee on short-term disability leave to report an absence “in a timely fashion on the official Time/Exception Report,” and in cases involving leave for civic obligations (jury duty, short-term military leave or parental leave) to “discuss

with the designated person in his/her academic unit teaching obligations and/or other essential duties that will be affected by absence.” (Article XIII C.1.b, pages 42-43, states that the Administration may in some cases require a release to-return-to-work, additional medical reports, or medical exam, but this has seldom been used.)

### Choosing Between FMLA and Contract Rights

There are times when FMLA rights work to your advantage, and times when the collective bargaining agreement provides stronger protections.

When you need to work on a reduced schedule due to a serious health condition, the FMLA obligates your administrator to cooperate if it can be shown that the reduction is a medical necessity. The contract, in contrast, says that such a reduced schedule “may” be an option (XIII.C.1.e). Under the FMLA, a half-time schedule would stretch the 12-week leave to 24 weeks.

The collective bargaining agreement provides for short-term disability payments related to the strictly medical consequences of maternity, typically lasting six to eight weeks. FMLA grants eligible employees 12 weeks of unpaid time off for paternity as well as maternity leave. The contract does provide for maternity and paternity leave unrelated to medical necessities, but such time off is more within the discretion of Administration.

You may also want to consider using the FMLA when you are caring for an immediate family member with a serious health condition. Although our contract (XIII.C.3) allows for up to five consecutive days (with pay) to care for a “seriously ill or injured” family member, the FMLA allows up to 12 weeks (without pay).

FMLA also allows for intermittent leave if you are caring for someone with unpredictable episodes of incapacity. For instance, if you have a parent with Alzheimer’s in Battle Creek you may have to leave at a moment’s notice to care for her. The FMLA gives you the right to go when needed without fear of retaliation.

FMLA, in other words, is a legal entitlement, and an improper refusal will expose the University to a law suit. The contract language is not always so iron-clad, and sometimes it gives a lot of discretion to the Administration. So if you have a department chair or director giving you the run-around, you may want to use— or at least mention— FMLA.

***“Because FMLA grants to eligible employees the absolute right to take FMLA leave for qualifying reasons under the law, employers have no discretion in this area and cannot deny the legitimate use of FMLA leave for such purposes without violating the prohibited acts section of the statute.”***

**Dept. of Labor, FMLA Regulations, page 26**

On the other hand, keep in mind that “family” is defined much more broadly under our contract. Under FMLA guidelines, family is limited to parent, spouse (legally married), and children, including an adult child incapable of self-care.

### **Outsourcing FMLA Management**

Many administrators recognize the FMLA’s positive contribution to employee morale and health. Unfortunately, there are some who see it as an opportunity to undermine the contractual rights of our members.

About a year ago the union office began to receive a growing number of calls from members who reported that administrators were pressuring them to opt for the unpaid provisions of the FMLA rather than the compensated rights protected by the collective bargaining agreement. Some reported that they were being penalized for exercising their right to any kind of leave, FMLA or contractual. Others indicated that administrators were reprimanding them for being “excessively absent” due to illness, even in cases where the member had just gone through major surgery.

The Union responded by obtaining and reviewing the “new FMLA policy” issued by the Administration. We submitted a detailed report to Human Resources outlining the several ways in which the new policy violated FMLA regulations, the contract, and state labor laws. To HR’s credit, the policies were reviewed and largely corrected.

Early this year, however, we were informed that the Administration had outsourced the management of FMLA leaves to a 3<sup>rd</sup> party administrator in Chicago, “FMLASource,” at an estimated cost of \$100,000 a year. Under new procedures accompanying this change, employees will have to submit medical certification to

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FMLASource. Employees can apply for a leave to FMLASource online, or by U.S. mail, or by calling an 800 number. Administrators can also request that an application be sent to an employee if, for example, the employee calls in sick three days in a row or reports an absence that qualifies for FMLA.

While we have been assured that no current practices will be changed, the union has questioned several aspects of this decision, including the Administration's preference for distant contractors unfamiliar with our workforce and collective bargaining agreement. In response, the Administration says it is short-staffed, that the law is complicated, and that outsourcing is cheaper.

Our stated concerns about protecting privacy when sending sensitive information out of state via the internet have been met with reassurances that such medical information will not be emailed or posted. However, the Administration has also included a waiver form in the application packet that gives the Administration and FMLASource access to

personal medical records. People should know that they are NOT required to sign this in order to qualify for an FMLA leave. At our request, the Administration has promised to change the language on the form to reflect that it is "an option," not a requirement.

With all of these complicating factors, it is important that you keep in mind your alternatives under the collective bargaining agreement, especially when it comes to addressing your own medical condition. There is an inevitable temptation for some administrators to ignore or dismiss these contractual rights because the FMLA provisions for leave are cheaper (unpaid vs. paid leave) and because the FMLA allows managers more latitude in demanding medical verification.

If you encounter difficulties regarding your rights under the collective bargaining agreement or under the FMLA, do not hesitate to contact our office via phone, email, or letter. You can also review your contractual and FMLA rights in detail on our web site.

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Go to our website: [www.aaupaft.org](http://www.aaupaft.org) for an electronic copy of this newsletter.

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