

CHEROKEE NATION

POLICY CHAPTER:	Time-Off Benefits	CHAPTER #:	V
SUBJECT:	Family and Medical Leave of Absence	SECTION-SUBSECTIONS:	F
EFFECTIVE DATE:	3-23-24	SUPERSEDES MATERIAL DATED:	10/31/2019
APPROVED BY:		DATE: 3/23/24	

PURPOSE

The Cherokee Nation has implemented this policy to provide leaves of absences that are comparable to the Family Medical Leave Act. The Cherokee Nation's adoption of this policy and procedure, which is consistent with FMLA, is not intended to grant or create any cause of action or remedy at law or in equity in Cherokee Nation Tribal court. Further, the Cherokee Nation's adoption of these policies and procedures is not intended to be construed as a waiver of sovereign immunity, consent to jurisdiction outside the nation's courts, or consent to any enforcement authority except as may be expressly made applicable to tribal governments.

POLICY

It is the policy of Cherokee Nation to provide leaves of absence to employees for compelling family and medical reasons as defined in the Family and Medical Leave Act of 1993, and as amended in 2013.

DEFINITIONS

A. ELIGIBLE EMPLOYEES

An employee is eligible for FMLA leave if he or she has worked for Cherokee Nation:

1. for at least one year and,
2. at least 1,250 hours during the previous 12 months. All periods of absence from work due to or necessitated by USERRA covered service is counted toward determining an employee's eligibility for FMLA leave.

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B. KEY EMPLOYEE

A key employee is a salaried FMLA-eligible employee who is among the highest paid 10% of all employees employed by the Cherokee Nation within 75 miles of the employee's worksite.

C. SITUATIONS QUALIFYING FOR FAMILY MEDICAL LEAVE

The following situations qualify for FMLA leave:

A. Basic Leave Entitlement - Eligible employees are entitled to at total of 12 weeks of FMLA leave during a rolling 12-month period for the following qualifying reasons:

1. For incapacity due to pregnancy, prenatal medical care, or birth of a child of the employee, and in order to care for such child; or
2. placement of a child into the employee's family by adoption or by foster care arrangement; or
3. in order to care for the employee's spouse, child or parent who has a serious health condition; or
4. a serious health condition which renders the employee unable to perform the functions of his or her position.

B. Military Family Leave Entitlements

1. Qualifying Exigency Leave is provided for eligible employees with a spouse, son, daughter, or parent on covered active duty or call to covered active duty status in the National Guard or Reserves in support of a contingency operation or Regular Armed Forces if the member is deployed to a foreign country. Eligible employees may use their 12-week leave entitlement during the rolling 12-month period to address certain qualifying exigencies. Qualifying exigencies may include short-notice deployment, attending certain military events, child care and school activities, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, rest and recuperation up to 15 calendar days, attending post-deployment reintegration briefings, parental care, and additional activities. An eligible employee may take all 12 weeks of his or her FMLA leave entitlement as qualifying exigency leave or the employee make take a combination of 12 weeks of leave for both qualifying exigency leave and leaves under Basic Leave Entitlement. Employees requesting this type of FMLA leave must provide Human Resources proof of the qualifying family member's call-up or active military service, or if applicable, a copy of the military members rest and recuperation leave order, or other document issued by the military before leave is granted.

V.F. Family and Medical Leave (cont.)

2. Military Caregiver Leave is provided for eligible employees to take up to 26 weeks of leave to care for a military member during a single 12-month period. A military member is a current member or covered veteran of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of duty on active duty that may render the servicemember medically unfit to perform his or her duties for which the servicemember is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disability retired list. Employees requesting this type of FMLA leave must provide certification of the need for recovery or care. An eligible employee is entitled to a combined total of 26 workweeks of military caregiver leave and leave for any other FMLA qualifying reason provided that the employee may not take more than 12 workweeks of leave for any other FMLA qualifying reason during this period. If the employee does not use the entire 26-workweek leave entitlement during the single 12 month period of leave, the remaining workweeks of leave are forfeited. The single 12 month period begins on the first day the eligible employee takes military caregiver leave and ends 12 months after that date.

D. SERIOUS HEALTH CONDITION

1. A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.
2. Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than 3 consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment.
3. A serious injury or illness of a covered servicemember means an injury or illness incurred by a covered servicemember in the line of duty on active duty that may render the service member medically unfit to perform the duties of his or her office, grade, rank, or rating. This includes injuries or illnesses that existed before the beginning of the member's active duty and were aggravated by service in the line of duty on active duty in the Armed Forces.
4. A serious injury or illness for a covered veteran means an injury or illness that was incurred or aggravated by the member in the line of duty on active duty in the Armed Forces

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and manifested itself before or after the member became a veteran, and is a continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the service member unable to perform the duties of the servicemember's office, grade, rank, or rating; or a physical or mental condition for which the covered veteran has received a VA Service Related Disability Rating of 50 percent or greater and such rating is based, in whole or in part, on the condition precipitating the need for caregiver leave; or a physical or mental condition that substantially impairs the veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service or would do so absent treatment; or an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

E. 12 MONTH PERIOD

1. The method for determining the 12-month period is a "rolling" 12-month period measured backward from the date an employee uses FMLA leave.
2. This method shall apply in all cases of family and medical leave. Cherokee Nation shall give sixty (60) days notice to all employees before changing methods.

F. EMPLOYEE'S RESPONSIBILITIES

1. Employees must provide sufficient information to Human Resources to determine if the leave may qualify for FMLA protection and the anticipated timing and duration of the leave. Sufficient information may include that the employee is unable to perform job functions; the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Supporting medical documentation must be forwarded to Human Resources.
2. Employees must inform Human Resources if the requested leave is for a reason for which FMLA leave was previously taken or certified.
3. If the requested leave is foreseeable, the employee must submit a request for leave to their supervisor at least thirty (30) calendar days in advance before the FMLA leave commences.
4. If an employee fails to provide notice for foreseeable leave with no reasonable excuse for the delay, the leave may be denied by Human Resources for 30 calendar days or more after the date the employee does provide notice to their supervisor.

VF. Family and Medical Leave (cont.)

5. If the thirty (30) days advance request is not practicable, the employee must notify their supervisor as soon as possible. This ordinarily means verbal notification on the same or next business day of when the need for leave becomes known to the employee. Employees must follow Cherokee Nation's usual and customary notice and procedural requirements for requesting leave, absent extenuating circumstances.
6. If the leave is foreseeable and 30 days or more notice was provided, the medical certification may be required to be provided within 15 calendar days after Human Resources' request.
7. The employee is required to provide Human Resources with subsequent recertification of medical conditions every thirty (30) days, if family and medical leave is taken for serious health conditions. Recertifications are not permitted for Certifications of Military Caregiver Leave. Recertification may be requested in more frequent intervals in certain situations. The employee will be responsible for expenses incurred for certification.
8. If an employee is on intermittent leave for a qualifying reason for which Human Resources has previously approved, when reporting an absence, tardy or requesting leave due to the qualifying FMLA reason, the employee must specifically reference the need for FMLA leave to their supervisor and Human Resources. Calling in without providing more information at the time of the call in will not be considered sufficient notice to designate leave time as FMLA. If the employee fails to designate the absence or tardy as FMLA, the absence or tardy may be counted toward the employee's overall attendance history and may result in disciplinary action.
9. Failure of an employee to properly request FMLA leave, or submit recertification may result in a loss or delay of protection and/or benefits under the Act and may result in disciplinary action per Cherokee Nation Progressive Discipline Policy.

G. SUPERVISOR'S RESPONSIBILITIES

1. If the employee does not expressly request FMLA leave on either a full-time or intermittent basis, the supervisor should inquire further of the employee to ascertain the reason for an employee's absence or tardiness and whether the leave is potentially FMLA qualifying.
2. When an employee is designated to use FMLA intermittently and contacts the supervisor to report an absence or tardy, the supervisor should inquire if the absence or tardy is related to FMLA.
3. The supervisor must provide a copy of the employee's timesheet to Human Resources for each period of FMLA leave taken. The employee's time sheet must be received in Human Resources at the end of each pay period.

V F. Family and Medical Leave (cont.)

4. The supervisor shall not allow the employee to return to work without first receiving notice from Human Resources that the "Fitness-for-Duty" certification has been received.

Note: Failure to follow and expedite the provisions of the Act may result in disciplinary actions in accordance with Cherokee Nation Human Resources Policies and Procedures, as well as, civil and/or criminal penalties. It is illegal to interfere with or discriminate against an employee based on their exercise of any of their FMLA leave rights or to oppose any lawful FMLA practices.

H. HUMAN RESOURCES' RESPONSIBILITIES

1. Human Resources must review and approve all requests for FMLA leave, and provide each employee with a notice that details the employee's rights and obligations under FMLA.
2. Medical documentation submitted with requests for Family Medical Leave forms must be strictly maintained in Human Resources.
3. Human Resources will inform employees of the amount of leave counted against the employee's leave entitlement.
4. If Human Resources determines the leave is not FMLA-protected, the employee will be notified.
5. Human Resources may designate qualified FMLA leave without the specific request of the employee.

I. FMLA PROVISIONS AND ISSUES

1. BIRTH, ADOPTION AND FOSTER CARE

Entitlement for FMLA leave for birth or placement for adoption or foster care expires at the end of the 12-month period beginning on the date of birth or placement. The balance of any FMLA leave available but not taken for this purpose will be forfeited, however, each employee may use the remainder of his/her FMLA leave for other allowable reasons.

2. SPOUSES WHO BOTH WORK FOR THE CHEROKEE NATION

Spouses who both work for the Cherokee Nation may only take a combined total of 12 weeks of FMLA leave during any 12-month period when leave is:

- (a) for the birth of a child or to care for a newborn,
- (b) for the placement of a child with the employee for adoption or foster care,
- (c) to care for the employee's parent with a serious health condition.

VF. Family and Medical Leave (cont.)

Military Caregiver Leave -Spouses employed by Cherokee Nation are limited to a combined total of 26 workweeks in a ..single 12-month period" if the leave is to care for a covered servicemember with a serious injury or illness, and for the birth and care of a newborn child, for placement of a child for adoption or foster care, or to care for a parent who has a serious health condition.

3. WHEN ADEQUACY OF MEDICAL CERTIFICATION IS QUESTIONED

- (a) Cherokee Nation may require at our expense, a second opinion by a health care provider designated or approved by Human Resources and who is not employed by Cherokee Nation on a regular basis.
- (b) In the event a conflict arises between the initial certification and the second opinion, Cherokee Nation may require, at our expense, a third opinion by a health care provider who is not employed by Cherokee Nation on a regular basis. The health care provider must be designated or approved jointly by the employee and Cherokee Nation. The result of the third opinion shall confirm the original or second opinion and be final and binding regarding both Cherokee Nation and the employee. Second or third opinions may be required for military caregiver leave certifications that are completed by health care providers, as defined in the Family Medical Leave Act, who are not affiliated with DOD, VA, or TRICARE.
- (c) When the employee fails to attempt in good faith to reach agreement on the selection of a third opinion provider, he or she will be bound by the second certification.

4. INTERMITTENT OR REDUCED LEAVE SCHEDULE

- (a) An eligible employee may take FMLA leave on an intermittent or reduced leave schedule basis due to a serious health condition when medically necessary.
- (b) Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt Cherokee Nation operations.
- (c) Leave due to qualifying exigencies may also be taken on an intermittent basis.
- (d) In the case of FMLA leave for the birth or placement of a child, intermittent leave or working a reduced number of hours is not permitted unless the Executive Director of Human Resources grants approval.

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- (e) The Cherokee Nation may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a work week, without affecting the exempt status of the employee.
- (t) The Cherokee Nation reserves the right to temporarily transfer an employee who takes FMLA leave on an intermittent or reduced leave schedule to an alternative position (with equivalent pay and benefits) in order to better accommodate the employee's schedule.

5. PAY STATUS

- (a) FMLA leave is generally considered unpaid leave. However, an employee will be required to use available legacy sick leave and PTO while on FMLA leave. Any period during the FMLA leave, after which available legacy sick leave and PTO is exhausted, will continue as unpaid periods, and will apply toward the 12-week or 26-week provision of the Family and Medical Leave Act.
- (b) In order to use paid leave for FMLA leave, employees must comply with Cherokee Nation's normal paid leave policies.
- (c) Because Workers' Compensation absence is paid leave, the provision for substitution of the employee's paid leave for unpaid FMLA leave is not applicable.
- (d) While on unpaid FMLA leave the employee shall not accrue PTO or legacy sick leave, or be paid for holiday leave.

6. HEALTH BENEFITS

During FMLA leave, an employee may continue health benefits under the same conditions as though the employee was not on leave. If the employee uses accrued legacy sick leave or PTO while on FMLA leave, the employee's contributions for health benefits will be automatically deducted from the employee's paycheck. If the employee is on unpaid FMLA leave, the employee must contact Human Resources to arrange to pay for the benefits.

7. OTHER BENEFITS

If the employee is using legacy sick leave or PTO while on FMLA leave, the employee's usual contribution for benefits will automatically be deducted from the employee's paycheck.

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If the employee is on unpaid FMLA leave, the employee must contact Human Resources to arrange to pay for benefits.

Use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

8. TEMPORARY MODIFIED DUTY

- (a) Cherokee Nation will consider the need to place an employee in a temporary modified duty position on a case-by-case basis.
- (b) Employees who voluntarily accept modified duty assignments in lieu of taking FMLA leave will lose their FMLA-based right to reinstatement to their original or an equivalent job if they remain in a light duty assignment at the end of the "rolling" 12-month leave period.
- (c) If the employee denies the temporary modified duty assignment the employee is entitled to remain on FMLA leave until the 12-week entitlement is exhausted.

9. INTEGRATION WITH OTHER LEAVE

FMLA leave runs concurrently with other types of leave. When an employee incurs a work-related illness or injury, which qualifies as a serious medical condition, the work-related leave of absence will be applied toward the employee's family and medical leave entitlement. *Because Workers' Compensation absence is paid leave, the provision for substitution of the employee's accrued paid leave for unpaid family medical leave is not applicable. As of the date Workers' Compensation ceases, the use of accrued paid leave may be required.*

FMLA leave runs concurrently with approved CN sponsored approved Short-term Disability coverage.

10. WHEN LEAVE ENDS

- (a) An eligible employee returning to work from FMLA leave has the right to return to the same or equivalent job on the same shift and at the same or geographically proximate work site.
- (b) If the employee cannot perform an essential function of his or her job because of physical or mental condition (including the continuation of a serious health

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condition), the employee is deemed inactive and entitlement to job restoration and continued leave ceases.

- (c) If the employee on FMLA leave is subject to layoff or a reduction in force, the employee's right to reinstatement shall be subject to the provisions of the Cherokee Nation Human Resources Policies and Procedures.
- (d) Employees who are under any type of discipline will return to work after the leave, at the same level.

11. RESTORATION OF KEY EMPLOYEES

Cherokee Nation may deny restoration to a "key employee" under the following conditions:

- (a) If the restoration would result in "substantial and grievous economic injury" to the operations of Cherokee Nation; and
- (b) If the Cherokee Nation notifies the employee that he or she will not be restored, as soon as, that determination is made.

12. FAILURE TO RETURN TO WORK

- (a) If the employee advises Cherokee Nation that he or she does not intend to return to work, the employment relationship is deemed terminated and the employee's entitlement to restoration, continued leave, and benefits cease.
- (b) If an employee fails to return to work after the 12 weeks of family medical leave is exhausted, the employee is deemed to have voluntarily resigned.
- (c) If an employee fails to return to work from a period of unpaid FMLA leave, the employee must reimburse the Cherokee Nation for its share of the employee's health premiums. This provision does not apply if the employee cannot return to work because of the continuation of a serious health condition. The employee will be subject to the Extension of Benefits-Group Insurance provisions of the Cherokee Nation Human Resources Policies and Procedures.

J. FITNESS-FOR-DUTY CERTIFICATION

1. An employee who takes FMLA leave because of a serious health condition must provide a Fitness-for-Duty medical certification prior to returning to work. The expense incurred for Fitness-for-Duty certification will be the responsibility of the employee.
2. An employee must provide a Fitness-for-Duty medical certification upon the expiration of the temporary modified duty assignment.

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3. Where reasonable job safety concerns exist, Human Resources may request a fitness-for-duty certification up to once every 30 days before allowing an employee to return to work from intermittent leave.
4. Job restoration will be delayed until the fitness-for-duty certification is provided.

K. INSTRUCTIONAL EMPLOYEES

"Instructional employees" of elementary and secondary education institutions (i.e., Sequoyah High School Teachers) are subject to the Special Rules under Title I Section I08 of the Family and Medical Leave Act. Such employees should consult the Human Resources Department for information on how they are affected by these rules.

L. EXTENSION OF BENEFITS UPON EXHAUSTION OF FMLA

Reference the "Extension of Benefits - Group Insurance" provisions under the Cherokee Nation Human Resources Policies and Procedures, Chapter V, Subsection G.