

# Supreme Court of Kentucky

2024-34

## CORRECTED ORDER

**IN RE:       Amendment to Section 7.04 of the Rules of Administrative Procedures, AP Part III, Personnel Policies**

Under Sections 110(5)(b) and 116 of the Constitution of Kentucky, it is ORDERED that Section 1.05 of the Rules of Administrative Procedures, AP Part III, Personnel Policies, is deleted in its entirety and replaced as follows:

### **SECTION 7.04 Family and Medical Leave**

(1)    General

- (a)    Section 7.04 of these Policies shall be construed in a manner consistent with the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 et seq., as amended by the National Defense Authorization Act, and 29 CFR Part 825, and any subsequent amendments.
- (b)    The KCOJ recognizes that FMLA makes it unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided under the Act. FMLA also makes it unlawful for any employer to discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.
- (c)    All documents relating to family and medical leave will be maintained in a file separate from an employee's personnel file and will be confidential.
- (d)    FMLA does not apply to elected or appointed officials.

(2)    Employee Eligibility

- (a)    FMLA applies to employees who have:
  - (i)    been employed for at least 12 months; and

- (ii) worked or been in paid status at least 1,250 hours during the 12-month period immediately before the use of family and medical leave is to begin.
- (b) An employee is eligible for family and medical leave if the employee:
- (i) Has a serious health condition that causes them to be temporarily unable to perform the essential functions of his or her position;
  - (ii) Has a child born to them, adopts a child, or has a child placed in his or her home for foster care;
  - (iii) Is caring for a newborn child, adopts a child, or has a child placed in his or her home for foster care, within one year of the birth, adoption, or placement;
  - (iv) Is caring for his or her parent who has a serious health condition;
  - (v) Is caring for their child who has a serious health condition. “Child” is defined as a biological, adopted, or foster child; stepchild; legal ward; or a child for which the employee is standing in loco parentis;
  - (vi) Is caring for their spouse, or person of similarly close relationship, who has a serious health condition. A person of similarly close relationship is defined as an intimate partner who has resided with the employee for at least one year prior to application;
  - (vii) Meets certain qualifying exigencies arising out of their spouse’s, child’s, or parent’s deployment, covered active - duty status, or notification of an impending call or order to covered active -duty status, in or to a foreign country (“qualifying exigency leave”). Qualifying exigency leave only applies to families of members in the Armed Forces, including the National Guard and Reserves, and certain retired members of the military. Qualifying exigency leave includes short-notice deployment, certain military events, and related activities, certain child care and school activities, addressing certain financial and legal arrangements, attending certain counseling activities, rest and recuperation, attending certain post-deployment activities, and additional purposes arising out of the call to duty, as agreed on by the employee and employer; or

- (viii) Is caring for their spouse, son, daughter, parent or next of kin (nearest blood relative) who is a covered service member. A covered service member is a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy; is otherwise in outpatient status; or is otherwise on the temporary disability retired list for a serious injury or illness; or a veteran who was a member of the Armed Forces, including the National Guard or Reserves, at any time during the five years preceding the date on which the veteran underwent that medical treatment, recuperation, or therapy.
  
- (c) 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 member of the employee's family from participating in school or other daily activities.
  
- (d) Subject to certain conditions, the continuing treatment requirement may be met by:
  - (i) A period of incapacity of more than three consecutive calendar days that requires in-person treatment by a health care provider within the first seven days of the first day of incapacity, and:
    - a. A second visit to a health care provider within 30 calendar days of the first day of incapacity unless extenuating circumstances exist; or
    - b. A regimen of continuing treatment (i.e., prescription medication, further medical visits, etc.) under the health care provider's supervision;
  - (ii) Incapacity due to pregnancy;
  - (iii) Incapacity due to a chronic serious health condition that requires periodic visits for treatment (at least twice per year); or
  - (iv) Other conditions to the extent required by law.

- (e) A medical condition will be deemed a serious injury or illness for purposes of Section 7.04(2)(b)(viii) of these Policies if the injury or illness was incurred or aggravated in the line of active duty and causes the member to be medically unfit to perform the duties of the member's office, grade, rank, or rating, and for which the service member is:
  - (i) Undergoing medical treatment, recuperation, or therapy;
  - (ii) In outpatient status; or
  - (iii) On the temporary disability retired list.
- (f) An eligible employee as defined in Section 7.04(2)(b)(i-vii) of these Policies is entitled to 12 weeks of family and medical leave during a calendar year. An eligible employee as defined in Section 7.04(2)(b)(viii) of these Policies is entitled to 26 weeks of family and medical leave during a calendar year. Each calendar year shall start on January 1.
- (g) A week of family and medical leave will equal the amount of time an employee normally works each week.
- (h) For part-time employees, a weekly average of the hours worked during the 12 weeks before beginning family and medical leave will be used to determine their normal work week.

(3) Request for Family and Medical Leave

- (a) An employee must provide the appointing authority or designee with a request for family and medical leave at least 30 calendar days before the leave is to begin if it is foreseeable based on an expected childbirth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or a member of his or her family, or the planned medical treatment for a serious injury or illness of a covered service member.
- (b) If the employee is unable to make the request at least 30 calendar days before the leave is to begin due to a medical emergency or change of circumstances, they must provide the appointing authority or designee with a request for family and medical leave as soon as possible under the facts and circumstances of the particular case (generally the same day the employee learns of the need for leave or the next business day).

- (c) An employee must request family and medical leave by completing the Application for Family and Medical Leave and submitting the application to his or her appointing authority or designee absent unusual circumstances. The appointing authority or designee must immediately forward the application to the AOC HR Department.
- (d) In all circumstances, when giving notice of the need for leave, the employee must provide sufficient information for the KCOJ to determine if the leave qualifies for FMLA protection. Failure to provide sufficient notice may result in family and medical leave being delayed or denied.
- (e) Once an employee has requested family and medical leave, the AOC HR Department will inform the employee within five business days, absent extenuating circumstances, whether he or she is eligible for such leave. If the employee is eligible, the employee will be instructed as to whether any additional information is required, and as to their rights and responsibilities under FMLA. If the leave is not eligible, the AOC HR Department will provide at least one reason for the ineligibility.
- (f) An employee who requests family and medical leave for the purpose of tending to their own or a member of their family's serious health condition, or a seriously ill or injured covered service member, must supply a certification by a health care provider within 15 calendar days after the request for leave, using the appropriate Certification of Health Care Provider Form, which includes the following:
  - (i) The employee is in need of care;
  - (ii) The employee is needed to care for a member of their family;  
or
  - (iii) The presence of the employee is necessary to the immediate family member in need of care.

The AOC HR Department will notify the employee in writing if it finds the certification incomplete or insufficient and will specify what additional information is necessary to make the certification complete and sufficient. The employee will then have seven calendar days to provide a corrected certification unless the deadline is not practical under the circumstances despite the employee's diligent and good faith efforts.

If the KCOJ has reason to doubt the validity of the certification provided, it may require the employee to obtain a second opinion from a physician

selected by the KCOJ at the KCOJ's expense. If the second opinion is in conflict with the first, the KCOJ may require the employee, at the KCOJ's expense, to see a mutually agreed upon health care provider for a final and binding opinion.

Periodic recertification may be required to the extent permitted by law.

- (g) If an employee requests intermittent family and medical leave due to a serious medical condition of the employee or member of his or her family, the employee must supply a Certification of Health Care Provider Form from a licensed health care provider stating that intermittent leave is medically necessary and indicating the expected duration of the leave.

Employees taking intermittent leave must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the business of the KCOJ. To better accommodate an employee's need for intermittent leave, the KCOJ may transfer an employee to an alternate, available position for which the employee is qualified and allow the employee to maintain equivalent pay and benefits.

- (h) If the leave is to address a qualifying exigency, the eligible employee must complete a Certification of Qualifying Exigency Form, accompanied by the required supporting documentation and a copy of the covered military member's deployment and/or covered active-duty orders within 15 calendar days after the request for leave.
- (i) An employee who fails to timely complete a sufficient certification form may be denied family and medical leave and will be subject to the KCOJ's other applicable leave and/or attendance policies. Appropriate certification forms are available from the AOC HR Department.
- (j) A licensed health care provider is a:
  - (i) Doctor of Medicine;
  - (ii) Doctor of Osteopathy;
  - (iii) Podiatrist;
  - (iv) Dentist;
  - (v) Clinical Psychologist;

- (vi) Licensed Clinical Social Worker;
- (vii) Optometrist;
- (viii) Chiropractor;
- (ix) Nurse Practitioner;
- (x) Nurse Midwife;
- (xi) Physician's Assistant; or
- (xii) Certified Christian Science Practitioner.

(4) Approval of Family and Medical Leave

- (a) An employee who has requested family and medical leave must be notified in writing if they have been granted or denied family and medical leave within five business days after the AOC HR Department receives the completed and sufficient medical certification and application. At that time, the AOC HR Department will inform the employee whether the leave will be designated as family and medical leave, and, if so, the amount of leave that will be counted against the employee's leave entitlement.
- (b) Even if a request for family and medical leave is not submitted pursuant to Section 7.04(3) of these Policies, an employee's absence from work may be designated by the AOC HR Department as family and medical leave if the appointing authority or designee or AOC HR Department has sufficient information that the employee is otherwise eligible for family and medical leave pursuant to Section 7.04(2)(a)-(h) of these Policies. Within five business days of obtaining sufficient information, the AOC HR Department will inform the employee that the leave will be designated as family and medical leave and the amount of leave will be counted against the employee's leave entitlement. Neither the employee nor the KCOJ may decline or delay a family and medical leave designation once an eligible employee has communicated a need to take leave for a reason listed in Section 7.04(2)(b)(i-viii) of these Policies.
- (c) Family and medical leave and any accrued paid leave must be used concurrently. Unpaid family and medical leave may only be granted after all other accrued paid leave is exhausted.

(5) Benefits During Family and Medical Leave

- (a) Any combination of working days, paid leave, or family and medical leave used by the employee within a month will entitle the employee to state-paid contributions for life insurance and health benefits in the following month.
- (b) If unable to work, employees must use their family and medical leave days consecutively and must elect to use family and medical leave as their only qualification for state contributions for life insurance and health benefits.
- (c) Employees on unpaid family and medical leave will be responsible for their share of contributions for life insurance and health benefits. The contributions will be due at the same time the contributions would be made by payroll deduction.
- (d) Employees who have used all of their accrued paid leave and family and medical leave and remain unable to work for more than 100 regular hours in the month may only continue group health and life insurance benefits for the following month by paying the total cost of the state's contribution and their self-contribution for the benefits.
- (e) For each month that an employee has not worked or been in paid status for 100 regular hours, the employee's annual or probationary increment will be postponed one month.

(6) Return From Family and Medical Leave

- (a) Before returning from family and medical leave, the employee must submit a Notice of Intention to Return to Work Form to his or her appointing authority or designee or directly to the AOC HR Department. The appointing authority or designee must immediately forward the form to the AOC HR Department.
- (b) An employee must present a fitness-for-duty certificate to the AOC HR Department prior to being restored to employment. If such certification is not timely received, the employee's return to work may be delayed until certification is presented.
- (c) Upon returning from family and medical leave, the employee will be reinstated to their previous position or an equivalent position. An "equivalent position" will be virtually identical in terms of pay; benefits; and working conditions, including privileges, prerequisites, and status. The equivalent position will involve



duties that are substantially similar to the employee's previous position.

- (d) On the first day of the employee's return to work, their benefits will be reinstated as applicable.
- (e) The KCOJ reserves the right to deny restoration to any key employee if it determines substantial and grievous economic injury will result if the employee is reinstated. Key employees are salaried employees and are among the highest paid 10 percent of all employees within 75 miles of the employee's worksite.

(7) Enforcement

- (a) An employee may file a complaint with the Wage and Hour Division of the U.S. Department of Labor or may bring a private lawsuit against an employer.
- (b) FMLA does not affect any federal or state law prohibiting discrimination or supersede any state or local law or collective bargaining agreement that provides greater family and medical leave rights.

(8) Questions

All questions about the FMLA policy should be directed to the AOC HR Department.

This Order shall be effective January 1, 2025.

All sitting; all concur.

Entered this 28th day of October 2024.

  
CHIEF JUSTICE