

A photograph of a beach with waves crashing onto the shore. In the foreground, a pair of colorful flip-flops with rainbow stripes and pink straps sits on the sand. The background shows the ocean with white foam from the waves.

# LEAVE ISSUES

NAGE/IBPO Federal/DC Division  
Director Sarah Suszczyk  
August 26, 2015

# Covered in this session:

- Annual Leave
- Sick Leave
- Family Care
- FMLA
- Leave and Discipline
- Negotiability and leave issues



- We will discuss leave generally, remember to refer back to your CBA





# Annual Leave Accrual

Federal employees earn annual leave based upon their time in service in accordance with government wide regulations.

- Less than 3 years of service → 13 days per year
- 3-15 years of service → 20 days per year
- 15 years of more → 26 days per year
- If you are in a non pay status for the full pay period, you do not accrue leave for that period.
- Full time employees may carry over 30 days of annual leave each year
- Part time employees may carry over 240 hours of annual leave

# Use of Annual Leave

- Employees are generally entitled to use annual leave, but may not take AL without the approval of the appropriate supervisor or other management official.
- Minimum charge to annual leave is 1 hour, unless the agency establishes a lower minimum.



# Advanced Annual Leave

- should be granted to the maximum extent practicable, in accordance with annual leave laws and regulations and consistent with mission needs, in particular for purposes related to pregnancy, childbirth, adoption
- An agency may advance the amount of annual leave an employee would accrue during the remainder of the leave year. Therefore, the later in the leave year the employee requests **advanced annual leave**, the smaller the amount that may be advanced.
  - An agency can deny advanced leave if the employee is not expected to return to federal service after taking leave for the birth, adoption or foster care.
  - An employee and supervisor should discuss and review the time the employee is going to be absent for childbirth, adoption and foster care. This would include consideration of leave and other workplace flexibilities and work-life programs available to the employee -- e.g., telework, alternative work schedules, annual leave, emergency backup dependent care, etc.
  - Agencies should develop policies and satisfy appropriate collective bargaining obligations to ensure they are able to meet employee needs, in addition to meeting their mission requirements.
- An employee is required to repay **advanced annual leave**, except in very limited circumstances; for example, disability retirement or death.

# Annual Leave Negotiable Proposals

- Proposals that would establish procedures for the granting of annual leave are generally negotiable. *National Park Service*, 24 FLRA 56 (FLRA 1986).
- A proposal that merely required the agency to consider requests for advance annual leave was negotiable. *Customs Service*, 46 FLRA 696 (FLRA 1992).
- A proposal stating that approved annual leave requests for 16 hours or more would be cancelled only for valid operational reasons requiring that the employee not take leave was ruled negotiable, in *Immigration and Naturalization Service*, 27 FLRA 467 (FLRA 1987).
- A proposal establishing the minimum increments in which employees could use annual leave was negotiable. *Veterans Administration*, 31 FLRA 360 (FLRA 1988).
- A proposal specifying procedures for the use of annual leave in conjunction with travel while in a duty status was negotiable. *Veterans Administration*, 31 FLRA 360 (FLRA 1988).
- A proposal that would require the agency to use seniority to resolve conflicting requests for annual leave was a negotiable procedure. *National Park Service*, 24 FLRA 56 (FLRA 1986).
- A proposal that would establish a system that would give employees access to desirable vacation periods on a rotating basis was negotiable. *Veterans Administration Medical Center, North Chicago*, 27 FLRA 714 (FLRA 1987).
- A proposal that would require the agency to attempt to place employees subject to forced use of annual leave into other areas of the organization during shutdowns or curtailments was negotiable. *Norfolk Naval Shipyard*, 42 FLRA 845 (FLRA 1991).
- A proposal that would require the agency to notify employees of the possibility that they would suffer a forfeiture of annual leave, and requiring it to assist them in scheduling leave to avoid forfeiture, was negotiable. *Veterans Administration*, 31 FLRA 360 (FLRA 1988).
- A proposal that would require the agency to pay nonappropriated fund employees for annual leave they were forced to forfeit was negotiable. *Marine Corps Logistics Base, Albany*, 29 FLRA 1587 (FLRA 1987).

# Annual Leave Non Negotiable Proposals

- Proposals that would place substantive restrictions on an agency's ability to determine when annual leave will be granted are generally nonnegotiable. The FLRA found such a proposal placed a substantive restriction on management's right to assign work. *Fort Carson*, 48 FLRA 168 (FLRA 1993).
- In *Bureau of Alcohol, Tobacco and Firearms*, 45 FLRA 339 (FLRA 1992), the FLRA held nonnegotiable a provision stating that the agency would allow employees to take at least two consecutive weeks of accrued annual leave each year, unless permitting such leave caused a severe work interruption. The FLRA explained that the proposal directly interfered with management's right to assign work, and that it didn't qualify as an appropriate arrangement.
- A proposal that would have prevented the agency from canceling previously approved annual leave requests except in emergencies was nonnegotiable. *Boston Military Entrance Processing Station*, 27 FLRA 968 (FLRA 1987).
- A proposal that would have required the agency to approve requests for advance annual leave "when possible" was nonnegotiable. *Bureau of Land Management*, 29 FLRA 1491 (FLRA 1987).
- A proposal that would have prohibited the agency from denying annual leave requests in connection with proposed or pending disciplinary actions was nonnegotiable. *Federal Deposit Insurance Corp.*, 10 FLRA 405 (FLRA 1982).
- A proposal that would have required the agency to grant annual leave in blocks of two consecutive weeks was nonnegotiable. *Fort Rucker*, 97 FLRR 1-1124 , 53 FLRA 606 (FLRA 1997).
- A proposal that would have required the agency to grant annual leave requests for all religious holidays unless doing so would interfere with the accomplishment of a critical job was nonnegotiable. *Portsmouth Naval Shipyard*, 37 FLRA 249 (FLRA 1990).
- A proposal that would have required the agency to approve a specific number or percentage of annual leave requests on any given day was nonnegotiable. *Social Security Administration, Patchogue, N.Y.*, 49 FLRA 793 (FLRA 1994).
- A proposal that would have required the agency to grant annual leave to union officers for the purpose of attending union-sponsored conventions and meetings was nonnegotiable. *Bureau of Alcohol, Tobacco and Firearms*, , 45 FLRA 339 (FLRA 1992).
- Proposals that would have required the agency to grant annual leave in lieu of sick leave and LWOP in lieu of annual leave upon request were nonnegotiable. *Kirtland AFB*, 84 FLRR 1-1608 , 15 FLRA 580 (FLRA 1984).
- A proposal that would have prevented the agency from changing the annual leave schedule of employees who transferred among departments was nonnegotiable. *Veterans Administration Medical Center, Martinsburg, W. Va.*, , 27 FLRA 239 (FLRA 1987).
- A proposal that would have established a cap on the number of employees who could be permitted to be on annual leave at any one time was nonnegotiable. *Social Security Administration, Patchogue, N.Y.*, 49 FLRA 793 (FLRA 1994).
- A proposal that would have prohibited the agency from disapproving or rescinding annual leave if doing so would result in the forfeiture of leave was nonnegotiable. *Naval Air Station, Whidbey Island*, , 41 FLRA 589 (FLRA 1991).
- A proposal that would have prohibited the agency from requiring employees to schedule or use annual leave unless they were in danger of forfeiture at the end of the year was nonnegotiable. *Bureau of Engraving and Printing*, 33 FLRA 711 (FLRA 1988).



# SICK LEAVE



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# SICK LEAVE

Sick leave is paid absence from duty. An employee is entitled to use sick leave for:

- Personal medical needs
- Incapacitated for duty by physical or mental illness
- Family care or bereavement
- Care of a family member with a serious health condition
- Adoption related purposes

See 5 USC Chapter 63 & 5 CFR Part 630, Subpart D

# Sick leave accrual and accumulation:

- Full Time – ½ day (4 hours) for each biweekly pay period
- Part Time – 1 hour for each 20 hours in a pay status
- Uncommon Tours of Duty – 4 hours X (average number of hours per biweekly pay period)/80 = bi weekly rate.

There is no total limit on accumulation & sick leave may be used as soon as it is credited.

# Limits on Sick Leave per Year

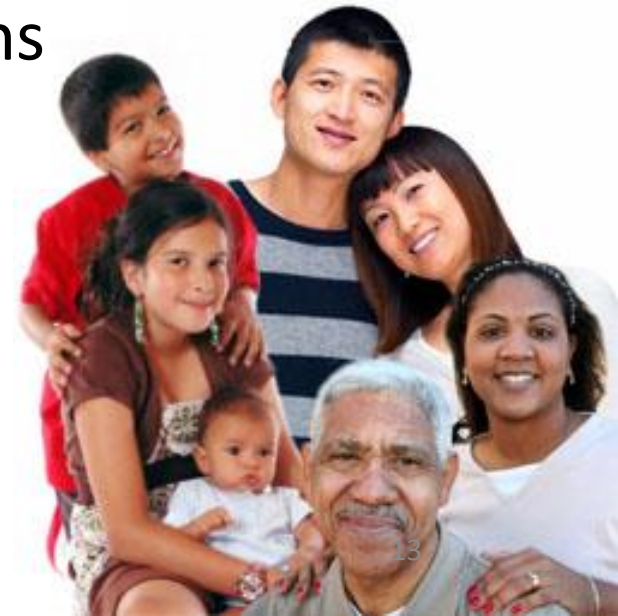
- No limitation for an employee's own personal medical needs
- Up to 13 days (104 hours) of sick leave for general family care and bereavement leave.
- Up to 12 weeks (480 hours) of sick leave to care for a family member with a serious health condition\*

\* If an employee used any of the general family care or bereavement leave that amount must be subtracted from the 12 week entitlement. An employee is entitled to no more than 12 weeks of leave a year for all family care purposes.



# Sick Leave Requests for Care of Family Members

- Up to 104 hours of family care to provide care for a family member illness or injury – includes non-serious conditions (colds, etc).
- A total of 480 hours to care for a family member with a serious health condition – if you invoke FMLA.
- If you have used 104 family care hours, you only have 376 hours available.
- These entitlements are distinct from the **LWOP** provisions of the FMLA.



# Family Care Sick Leave

- Who qualifies?
  - Spouse, Parents, In-laws
  - Children (including adopted) and their spouses
  - Brother/sister and their spouses.
- Agency may require medical documentation from family member's health care provider.
- Must be actively providing care to sick family member to use sick leave.

# Bereavement Leave

- May be used for leave related to the death of a family member:
  - Making arrangements
  - Attending funeral
  - Executor duties
  - Travel time
  - Arranging sale of home.
- Limited to family care hours – 104 per year.

# Requesting Sick Leave

- Employee must request sick leave within time limits set forth by Agency and/or CBA.
- Agency may require advanced approval for medical appointments (own or family members).
- If employee complies with agency's notification and medical evidence requirements, the agency **MUST** grant the leave.





# Granting Sick Leave

- Sick leave must be granted for authorized purposes
- Subject to limitations on how much leave may be used for certain purposes, i.e. family car
- Employee must
  - Follow leave procedures
  - Provide documentation when necessary
  - Has leave available
- Approval is discretionary when:
  - Employee does not follow leave procedures
  - Does not produce evidence as required
  - Abuse or fraud is suspected
  - Employee does not have sick leave accrued

# Supporting Evidence

- Agency may grant sick leave only when supported by administratively acceptable evidence.
- Absences in excess of 3 day, or for a lesser period when determined necessary, the Agency MAY require a medical certificate.
- Employee must provide administratively acceptable evidence within 15 days

"Dr. J" Moriarty  
Sufriender Foundation  
942 Calle Negocio  
San Clemente, CA 92673

Date: 6/20/13

Please excuse:  Work  School  PE

From:  Work  Injury  Illness  Other: SUNSET

DUE TO:  Other: SUNSET

From: SAM

Thank You



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**SICK NOTE**

**Excused Absence**

The Medical Center

Date: February 13

Excused from:  Work  Class  Other

Notes: Bitten by rabid raccoon with crazy eyes.

Signature: Dr. Yuri Zhivago

# Sick Leave Abuse

- Calling in sick when not incapacitated or not providing family care
- Leave patterns around weekends, holidays, telework and when an unpleasant task is due to be performed.



# Sick Leave Restriction

- Under 5 CFR 630.405(a), agencies may request administratively acceptable evidence of injury or illness for any period of time. This is called sick leave restriction.
- Restriction letter intended to make employee think twice about using sick leave.
- If employee doesn't follow sick leave restriction letter may be charged AWOL and receive discipline.
- Employees may not be disciplined for taking approved leave unless there is direct evidence of abuse.
- Employee may not be placed on leave restriction for FMLA absences.



# Disciplinary Actions and Sick Leave Use

- If leave was approved by management cannot be used as basis for discipline unless there is evidence of sick leave abuse or excessive absenteeism with no apparent end.
- Management's unreasonable denial of leave could result in grievance, eeo or other complaint.
- Management must comply with CBAs and agency/government rules and regulations.

# PREGNANCY & CHILDBIRTH

- A pregnant woman who must be absent prior to birth for her or her child's health is entitled to sick leave.
- Any period of incapacity due to pregnancy or childbirth is considered a serious health condition.
- Once the incapacitation is over, there is no entitlement to sick leave.
- There is NO provision in the law or regulation that permits the use of sick leave to be absent from work to care for or bond with a healthy newborn.



# Advanced Leave/Parental Leave

- By presidential memorandum 1/15/2015, President Obama directed agencies to ensure that do the extent permitted by law, to offer 240 hours of advanced sick leave or annual leave at the request of an employee in connection with the birth or adoption of a child regardless of existing leave balances.
- OPM guidance to the agencies – to the maximum extent practical and consistent with mission needs.
- Can be denied if the employee is not expected to return.
- Agency could require to invoke FMLA as a condition to granting this discretionary benefit. See agency policy and CBA.

# The Family and Medical Leave Act (FMLA)

FMLA provides eligible employees, in any 12 month period, up to 12 weeks of unpaid leave for birth, adoption or serious health condition of the employee or employee's qualifying family member.

Also provides for military family leave in two instances – when a service member is called to active duty and service member caregiver leave.

## Which Title Applies?

- Title I – USPS; DC Govt; temporary employees (1 Year or less); Non Appropriated Fund (NAF) employees of DOD, Coast Guard; Title 38 employees (VA)
- Title II – Almost all other Federal employees who have worked at least 12 months
- Please comparison of the two titles for more information.

# FMLA

- FMLA **is leave without pay.**
- But most federal employees (FMLA Title II) may substitute paid sick or annual leave for LWOP as part of their 12 week entitlement.
- The Agency may not deny the employee the right to substitute leave.
  - If available, employee may use as much as 480 hours of sick leave.
  - If out of sick leave, employee may request annual leave or stay on LWOP.
- If the employee does not want to substitute, the Agency cannot require it.

# FMLA Definitions

- Family member refers ONLY to parent, spouse, son and daughter, and *in loco parentis*.
- Serious health condition means illness, injury, impairment, or physical or mental condition that involves either inpatient care or continuing treatment by a health care provider.
- FMLA leave may be taken intermittently – separate blocks of time rather than one period.

# Requesting FMLA – Title II

- Must invoke FMLA when requesting leave.
- A statement of unspecified illness without documentation is not notice.
- If need for leave is foreseeable, must give 30 days notice. The Agency may waive notice requirements.
- May not invoke FMLA retroactively.





# Medical Documentation – Title II

- Agency may require that a request for leave be supported by certification issued by the health care provider:
- Certification will be sufficient if it states:
  - The date on which the serious health condition commenced
  - The probable duration of the condition
  - The appropriate medical facts within the knowledge of the health care provider regarding the medical condition.
  - A statement that the employee is needed to care for the individual in question and an estimate of the amount of time needed to care for the individual if leave for family care is involved.
  - A statement that the employee is unable to perform the functions of the position if leave for self care is involved.
  - Dates for and duration of medical treatment if the leave involves a reduced schedule or intermittent leave.

# Medical Documentation – Title II

If agency request medical documentation, an employee must provide the written medical certificate signed by the health care provider no later than 15 calendar days after the date of the request.

If not practical despite employee's good faith efforts, the employee may have up to 30 calendar days.

If Agency doubts the validity, it can request 2<sup>nd</sup> and 3<sup>rd</sup> opinion at agency expense.

# Medical Information and Privacy

- All medical information must be kept in files separate from the employee's personnel file.
- Must remain confidential subject to limited exceptions – may be disclosed to those making the decision whether to grant reasonable accommodation or need to know basis.
- Information may not be further disclosed except in the following circumstances:
  - Supervisors and managers who need to know may be told about necessary restrictions on the work or duties of the employee and about the necessary accommodations.
  - First aid and safety personnel may be told if the disability might require emergency treatment.
  - Government officials may be given information necessary to investigate the agency's compliance with the Rehabilitation Act.
  - The information may, in certain circumstances, be disclosed to workers' compensation offices or insurance carriers.
  - Agency EEO officials may be given the information to maintain records and evaluate and report on the agency's performance in processing reasonable accommodation requests.

# LEAVE STACKING

- When an employee uses all other means of leave available for a FLMA qualifying reason and then invokes FMLA for the same reason.
- Example: Employee uses 5 weeks of SL to care for daughter with serious health condition, 2 weeks when daughter has surgery, and 3 weeks for another serious health condition. Employee now asks for 12 weeks of FMLA leave using 6 weeks of AL and 6 weeks LWOP. Her request must be granted (Title II).
- If she asked to substitute SL instead of AL, only 2 could be granted because of limits to family care.

# FMLA Continued...

- Upon return from FMLA leave, the employee must be restored to the original job, or to an equivalent job with equivalent pay, benefits, and other terms.
- Employees do not accrue additional benefits (leave) while on FMLA.
- Employers are required to maintain health insurance coverage.

# Too ill to work?

What happen when the employee is too sick to work and there is no end in sight?

- Disability retirement
- Separation disability
- Removal for excessive absence



# Disability Retirement

- Employee applies
- Medical condition has left the employee unfit for service
- No reasonable accommodation available
- No reassignment available in commuting area
- Medical condition has documented impact on attendance or performance.
- OPM makes determination.



# Separation Disability

- Agency takes action
- Employee unable to perform/meet job requirements.
- Supported by medical documentation
- Available leave is not relevant.
- Must receive a removal for separation disability – not misconduct.

# Excessive Absence

- Agency may take adverse action based on excessive leave use when
  - Employee absent for compelling reasons
  - Absences continued beyond a reasonable time
  - Employee was warned that adverse action was possible for continued absenteeism
  - Agency can show that position needs to be filled by employee available for duty.
  - FMLA leave cannot not be included in excessive absenteeism charge, but can still be charged if absence exceeds 12 weeks.

# Sick Leave and Negotiability

- Proposals requiring agencies to grant sick leave for incapacitated employees affect the right to assign work but generally constitute negotiable appropriate arrangements. *Bureau of Alcohol, Tobacco and Firearms*, 43 FLRA 1442 (FLRA 1992).
- An arbitrator's award granting sick leave under conditions where it is not warranted by OPM regulations was contrary to law. *DVA Medical Center, West Palm Beach, Fla.*, 63 FLRA 544 (FLRA 2009).
- A proposal or provision requiring awards for employees for the non-use of sick leave has nothing to do with employee performance and is therefore contrary to law. *DVA Medical Center, Asheville, N.C.*, 59 FLRA 461 (FLRA 2003); *DVA Medical Center, Newington, Conn.*, 53 FLRA 271 (FLRA 1997).
- In *Bureau of Engraving & Printing*, 33 FLRA 711 (FLRA 1988), the FLRA approved as negotiable a proposal providing to the employee the right to substitute a request for annual leave or leave without pay in the event a request for sick leave was denied, unless the employer takes disciplinary action against the employee. The FLRA noted that the proposal did not require the agency to approve the substitute request, nor did it establish criteria governing the agency's consideration of the employee's request.
- Proposals establishing the procedures employees will follow in requesting sick leave are negotiable so long as they do not interfere with an agency's discretion to approve or disapprove leave requests. *Veterans Administration*, 31 FLRA 360 (FLRA 1988).
- Belated requests for sick leave may be grounds for discipline. However, sick leave may not be denied if an employee is incapacitated for duty and has sick leave available. *Bureau of Engraving and Printing*, 33 FLRA 711 (FLRA 1983).
- Proposals requiring an agency to grant sick leave under conditions where it is not warranted by OPM regulations are not negotiable. *Rock Island Arsenal*, 42 FLRA 1019 (FLRA 1991).
- Proposals allowing employees to use sick leave they have not yet earned (advance sick leave) are negotiable to the extent they are consistent with law and regulation. *Patent and Trademark Office*, 53 FLRA 539 (FLRA 1997).
- A proposal requiring the agency to grant advance sick leave "when possible" interfered with the right to assign work in that it would subject the management decision to arbitral review. *Bureau of Land Management*, 29 FLRA 1491 (FLRA 1987).

## Evidence of incapacitation

- Proposals specifying the conditions under which an agency may require an employee to provide a medical certificate generally are negotiable. *Federal Deposit Insurance Corp*, 12 FLRA 532 (FLRA 1983).
- A proposal requiring the agency to exercise its right to obtain evidence to support sick leave use in a fair and objective manner interfered with the agency's right to discipline. *Customs Service*, 46 FLRA 696 (FLRA 1992).
- A proposal that prohibited an agency from calling the home of an employee on sick leave impacted the agency's choice of investigative methods and therefore interfered with the right to discipline. *Naval Air* , 43 FLRA 25 (FLRA 1991).
- A proposal that an agency "should refrain" from calling an employee's doctor but did not prohibit writing to the doctor was a negotiable appropriate arrangement. *Naval Air Station*, 43 FLRA 25 (FLRA 1991).
- Proposals that allow employees not to reveal the nature of their illnesses as a precondition for sick leave approval interfere with management rights. *Veterans Administration*, 31 FLRA 360 (FLRA 1988).
- Union proposals limiting the amount of information an agency may require from an employee to support a sick leave request are non-negotiable. Part of an agency's statutory right to discipline and assign work is the right to require employees to account for their use of sick leave. *Naval Coastal Systems Center*, 36 FLRA 725 (FLRA 1990).
- Proposals that would limit management officials authorized to request medical verification of an employee's illness are non-negotiable. *Army Aviation Center and Fort Rucker*, 29 FLRA 1447 (FLRA 1987).

## Sick leave restriction

- In *VAMC, Milwaukee*, 35 FLRA 521 (FLRA 1990), the FLRA denied the negotiability of a proposal that employees would receive counseling and thereafter show no improvement before being placed on sick leave restriction. The provision was considered inconsistent with management's right to take disciplinary action.
- Finding sick leave restriction a prelude to discipline, the FLRA declared non-negotiable a proposal that required the agency to provide warnings to employees before placing them under leave restrictions. The proposal interfered with the management right to discipline. *Department of Agriculture, Federal Crop Insurance Corporation*, 42 FLRA 1169 (FLRA 1991)
- A proposal that would allow, but not require the agency to provide written warnings to employees before placing them under leave restriction did not interfere with management rights. *Patent and Trademark Office*, 53 FLRA 539 (FLRA 1997).