

NEW GUIDELINE – VOL. 26, NO. 1

FMLA LEAVE

Definitions Applicable to FMLA Leave

The term "child" (i.e., son or daughter) means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age eighteen (18), or age eighteen (18) or older and "incapable of self-care" because of a mental or physical disability (as defined by the Americans with Disabilities Act (ADA), as amended) at the time the FMLA leave is to commence.

The term "incapable of self-care" means that the individual requires active assistance or supervision to provide daily self-care in three (3) or more of the "activities of daily living" (ADLs) (e.g., caring appropriately for one's grooming and hygiene, bathing, dressing, eating) or "instrumental activities of daily living" (IADLs) (e.g., cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.).

An employee is "unable to perform the functions of his/her position" where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position. Additionally, an employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.

Leave for Adoption or Foster Care

Eligible employees may take FMLA leave before the actual placement or adoption of a child if an absence from work is required for the placement or foster care to proceed. Permissible absences include, but are not limited to, the employee attending a required counseling session, appearing in court, consulting with his/her attorney or the doctor(s) representing the birth parent, submitting to physical examinations, or traveling to another country to complete an adoption.

Military Family Leave Entitlements

A. Military Caregiver Leave

Eligible employees may take up to twenty-six (26) weeks of unpaid FMLA leave, in a "single 12-month period," to care for a covered service member with a serious injury or illness. The "single 12-month period" begins on the first day the eligible employee takes Military Caregiver Leave and ends twelve (12) months after that date. If the employee does not use his/her entire twenty-six (26) work weeks leave entitlement during the "single 12-month period" of leave, the remaining work weeks of leave are forfeited.

For purposes of Military Caregiver Leave, the covered service member may be a (1) current 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 (2) a veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) and was discharged or released under conditions other than dishonorable at any time during the period of five (5) years prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. For an individual who was a member of the Armed Forces and who was discharged or released under conditions other than dishonorable prior to March 8, 2013, the period between October 28, 2009, and March 8, 2013, shall not count towards the determination of the five-year period for covered veteran status.

Serious injury or illness for purposes of Military Caregiver Leave is defined as an injury or illness incurred by a covered service member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the covered service member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and that may render the service member medically unfit to perform the duties of his/her office, grade, rank, or rating.

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In the case of a veteran, a serious injury or illness means an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or that existed before the beginning of the member's active duty and was aggravated by the service in the line of duty on active duty in the Armed Forces) and manifested itself before or after the member became a veteran and is (1) 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 service member's office, grade, rank, or rating; (2) a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of fifty percent (50%) or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; (3) a physical or mental condition that substantially impairs the covered 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 (4) 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.

The term "son or daughter of a covered service member" means a covered service member's biological, adopted, or foster child, stepchild, legal ward, or child for whom the service member stood in loco parentis, and who is of any age. Similarly, the term "parent of a covered service member" means a covered service member's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered service member. (The term does not include parents "in-law.")

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The term "next of kin" means the service member's nearest blood relative, other than the covered service member's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the service member by court decree or statutory provisions; brothers and sisters; grandparents; aunts and uncles; and first cousins; unless the covered service member has specifically designated in writing another blood relative as his/her nearest blood relative for purposes of Military Caregiver Leave under the FMLA, in which case the designated individual shall be deemed to be the covered service member's next of kin. All family members sharing the closest level of familial relationship to the covered service member are considered the covered service member's next of kin, unless the covered service member has specifically designated an individual as his/her next of kin for Military Caregiver Leave purposes. While an eligible employee may care for more than one (1) seriously injured or ill covered service member at the same time, the employee may not take more than twenty-six (26) work weeks of leave during each "single 12-month period."

Military Caregiver Leave is a "per-service member, per-injury" entitlement. Therefore, an eligible employee may take twenty-six (26) work weeks of leave to care for one (1) covered service member in a "single 12-month period," and then take another twenty-six (26) work weeks of leave in a different "single 12-month period" to care for another covered service member or to care for the same service member with a subsequent serious injury or illness (e.g., if the service member is returned to active duty and suffers another injury). Additionally, an eligible employee could take FMLA leave, after the end of the "single 12-month period" for Military Caregiver Leave, to care for a covered service member if the member is a qualifying family member under non-military FMLA and s/he has a serious health condition.

B. Qualifying Exigency Leave

Eligible employees may take up to twelve (12) weeks of unpaid FMLA leave for any of the following qualifying exigencies that are related to the fact that the employee's spouse, son, daughter or parent is on covered active duty or call to covered active duty status, or has been notified of an impending call or order to covered active duty in the Armed Forces:

1. Issues arising from a qualifying family member's **short-notice deployment** (i.e., deployment on seven (7) or less calendar days of notice) for a period of seven (7) days from the date of notification.
2. **Military events and related activities**, such as official ceremonies, programs, or events sponsored by the military, **or** family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross related to a qualifying family member's covered active duty or call to covered active duty status.
3. Certain **childcare and related activities** arising from a qualifying family member's covered active duty or call to covered active duty status, such as arranging for alternative childcare, providing childcare on an urgent, immediate need basis (but not on a routine, regular, or everyday basis), enrolling or transferring a child in a new school or day care facility, and attending certain meetings at a school or a day care facility if they are necessary due to circumstances arising from the active duty or call to active duty of the covered military member (this does not include providing child care on a routine, regular or everyday basis).

4. Making or updating **financial and legal arrangements** to address a qualifying family member's absence (e.g., preparing and executing financial and healthcare power of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System, obtaining military identification cards, or preparing or updating a will or living trust) and acting as the military member's representative before a Federal, State, or local agency for purposes of obtaining, arranging, or appealing military service benefits while the military member is on covered active duty or call to covered active duty status, and for a period of ninety (90) days following the termination of the military member's covered active duty status.
5. Attending **counseling** provided by someone other than a healthcare provider for oneself, the qualifying family member, or the child of the qualifying family member, the need for which arises from the qualifying family member's covered active duty or call to covered active duty status. The child must be the military member's biological, adopted, or foster child, stepchild, legal ward or child for whom the military members stands in loco parentis, who is either under eighteen (18) years of age or eighteen (18) years of age or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence.
6. Taking up to **fifteen (15)** days of leave to spend time with a qualifying family member who is on short-term, temporary, **rest and recuperation** leave during the deployment.
7. Attending to certain **post-deployment activities**, including attending arrival ceremonies, reintegration briefings and events, and other official ceremonies or programs sponsored by the military for a period of ninety (90) days following the termination of the qualifying family member's covered active duty status, and addressing issues arising from the death of a qualifying family member.

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8. Providing parental care for a parent of a military member who is incapable of self-care and is the military member's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered service member when the member was under eighteen (18) years of age. "Incapable of self-care" means the parent requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living (includes adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating) or instrumental activities of daily living (includes cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.). Parental care includes (1) arranging for alternate care when the parent is incapable of self-care and the covered active duty or call to covered active duty status necessitates a change in the existing care arrangement for the parent; (2) providing care on an urgent, immediate need basis (but not on a routine, regular or everyday basis) when the parent is incapable of self-care and the need to provide such care arises from covered active duty or call to covered active duty status; (3) admitting or transferring to a care facility a parent when admittance or transfer is necessitated by the covered active duty or call to covered active duty status; and (4) attending meetings with staff at a care facility, such as meetings with hospice or social service providers for a parent when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status but not for regular or routine meetings.
9. Any other event that the employee and the Board agree is a qualifying exigency.

The term "qualifying family member" for purposes of Qualified Exigency Leave means a staff member's spouse, son, daughter or parent.

The term "covered active duty" or "call to covered active duty status" for purposes of Qualified Exigency Leave means duty for a member of the Regular Armed Forces during deployment of the member with the Armed Forces to a foreign country, and, in the case of a member of the Reserve components of the Armed Forces, duty during deployment of the member with the Armed Forces to a foreign country under a Federal call or order to active duty in support of a contingency operation pursuant to Sections 688, 12301(a), 12302, 12304, 12305, 12406, or Chapter 15 of Title 10 of the United States Code or any other provision of law during a war or during a national emergency declared by the President or Congress as long as it is in support of a contingency operation.

The term "son or daughter" means the employee's biological, adopted, or foster child, stepchild, legal ward, or child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age. Similarly, the term "parent" means a biological, adoptive, step, or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter. (The term does not include "parents in-law.")

Employee Request for FMLA Leave

While eligible employees are not required to expressly request unpaid FMLA leave, it is requested that eligible employees who seek an unpaid FMLA leave for any of the approved reasons complete and submit to the **Superintendent****Director** a written request for FMLA leave.

Employee Certifications

Eligible employees who apply for FMLA leave to care for an immediate family member must submit DOL Form (WH-380-F; "Certification of Health Care Provider for Family Member's Serious Health Condition").

Eligible employees who apply for FMLA leave for the employee's own serious health condition must submit DOL Form (WH-380-E; "Certification of Health Care Provider for Employee's Serious Health Condition").

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- [X] The ~~Superintendent~~ Director shall attach a statement of the essential functions of the employee's position for the health care provider to review. In order for the Certification Form to be considered sufficient, the health care provider must specify what function of the employee's position the employee is unable to perform so that the Corporation can then determine whether the employee is unable to perform one (1) or more essential functions of the employee's position.

Eligible employees who apply for Military Caregiver Leave must submit DOL Form (WH-385; "Certification for Serious Injury or Illness of Covered Service Member – for Military Family Leave" or WH-385-V, "Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave). The form may be completed by a Department of Defense (DOD) health care provider, Veterans Affairs health care provider, a DOD TRICARE network authorized private health care provider, a DOD non-network TRICARE authorized private health care provider, or any health care provider as defined by 29 C.F.R. 825.125.

Additionally, with respect to Military Caregiver Leave, the Corporation will accept the submission of an Invitational Travel Order (ITO) or Invitational Travel Authorization (ITA), in lieu of the DOL Form, for the time period specified in the ITO or ITA. The ITO or ITA submitted by the employee need not list the employee as the named recipient of the ITO/ITA, provided the employee is the spouse, parent, son, daughter or next of kin of the covered service member. If the covered service member's need for care extends beyond the expiration date specified in the ITO or ITA, the employee is responsible for submitting the DOL Form for the remainder of the employee's leave period. The Corporation will also accept, with respect to Military Caregiver Leave, documentation indicating the service member's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers, regardless of whether the employee is the named caregiver in the documentation.

Employees are advised that the ~~Superintendent~~ Director may seek authentication and clarification of such documentation, and may require an employee to provide confirmation of covered family relationship to the seriously injured or ill service member and documentation showing that the discharge was other than dishonorable and the date of the veteran's discharge.

It is the employee's responsibility either to furnish a complete and sufficient certification or to furnish the health care provider providing the certification with any necessary authorization from the employee or the employee's family member in

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In all instances in which certification is requested, it is the employee's responsibility to provide the Board with complete and sufficient certification, and failure to do so may result in denial of FMLA leave.

Eligible employees who apply for any of the three (3) preceding types of FMLA leave must also execute and provide to his/her health care provider a HIPAA-compliant release form.

If the **Superintendent** **Director** deems a medical certification to be incomplete or insufficient, the **Superintendent** **Director** shall notify the employee, in writing, what information is lacking, and the employee will have seven (7) calendar days to cure the deficiency. The **Superintendent** **Director** (i.e., the Board's health care provider, human resource professional, leave administrator, or other management official, but not the employee's direct supervisor) may contact the certifying health care provider for clarification concerning or to authenticate the content of a medical certification. The representative, however, shall not ask the health care provider for additional information beyond that required by the certification form.

[X] Employees who take leave for the employee's own serious health condition, prior to returning to work, must submit to the **Superintendent** **Director** a "Fitness-for-Duty Certification". Again, the employee will need to have executed and provided to his/her Health Care Provider a HIPAA-compliant form.

Eligible employees who apply for FMLA leave for Qualifying Exigency Leave must submit DOL Form WH-384; "Certification of Qualifying Exigency for Military Family Leave". Specifically, the first time the employee requests Qualifying Exigency Leave, the employee must provide a copy of the qualifying family member's covered active duty orders or other documentation issued by the military that indicates that the qualifying family member is on covered active duty or call to covered active duty status, and the dates of the qualifying family member's covered active duty service. Additionally, each time that the employee requests leave for one of the above-listed qualifying exigencies, the employee must certify the exigency necessitating leave. Such certification supporting leave for a qualifying exigency includes:

- appropriate facts supporting the need for leave, including any available written documentation supporting the request and the type of qualifying exigency;

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- where leave will be needed on an intermittent basis, an estimate of the frequency and duration of the qualifying exigency;
- appropriate contact information if the exigency involves meeting with a third party and a brief description of the purpose of the meeting; and if the qualifying exigency involves Rest and Recuperation leave, a copy of the military member's Rest and Recuperation orders or other documentation issued by the military that indicates the military member has been granted Rest and Recuperation leave and the dates of such leave.

Employees are advised that if the qualifying exigency involves a meeting with a third party, the **Superintendent Director** may verify the schedule and purpose of the meeting with the third party. Also, the **Superintendent Director** may contact the appropriate unit of the Department of Defense to confirm that the qualifying family member is on covered active duty or call to covered active duty status.

All of the certifications identified above must be submitted by the employee within fifteen (15) calendar days after the Corporation provides the employee with the applicable DOL Form unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts. An employee may not be held liable for administrative delays in the issuance of military documents, despite the employee's diligent, good faith efforts to obtain such documents.

Light Duty

Time spent performing "light duty" work does not count against an employee's FMLA leave entitlement.

Corporation Notices to Employee (Forms are available on the U.S. Department of Labor Website: www.dol.gov)

If the information included in the Employees Rights and Responsibilities Notice changes, the **Superintendent Director** will inform the employee of such changes within five (5) business days of receipt of the employee's first notice of the need for FMLA leave subsequent to any change. **The Director** is charged with responsively answering questions from employees concerning their rights and responsibilities.

If it is not possible to provide the number of hours, days or weeks that will be counted as FMLA leave (e.g., where the leave will be unscheduled), the **Superintendent****Director** will provide this information upon request by the employee, but no more often than every thirty (30) days and only if leave was taken during the period. The notice of the amount of leave counted against the employee's FMLA entitlement may be oral or in writing. If such notice is oral, it shall be confirmed in writing, no later than the following payday that is at least one (1) week after the oral notice. Such notice may be in any form, including a notation on the employee's pay stub.

FMLA Leave and Mandatory Overtime

Employees with proper medical certification may use FMLA leave in lieu of working required overtime hours. Thus, hours that an employee would have been required to work but for the taking of FMLA leave will be counted against the employee's FMLA entitlement.

Calculating the Amount of FMLA Leave Used by an Employee

For purposes of determining the amount of FMLA leave used by an employee, the fact that a holiday may occur within the work week taken as FMLA has no effect; the week is counted as a week of FMLA leave. If, however, the employee is using FMLA leave in increments of less than one (1) week, the holiday will not count against the employee's FMLA leave entitlement unless the employee was otherwise scheduled and expected to work during the holiday. Similarly, when an employee is not scheduled to work during winter, spring or summer vacation (i.e., during a period when some or all employees are not expected to work for one (1) or more weeks), the days the employee is not scheduled to work shall not count against the employee's FMLA leave entitlement.

When an employee takes FMLA leave on an intermittent or reduced schedule leave basis, the leave shall be accounted for by using an increment no greater than the shortest period of time that the Corporation uses to account for use of other forms of leave provided that it is not greater than one (1) hour and provided that the employee's FMLA leave entitlement is not reduced by more than the amount of leave actually taken.

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Maintenance of Employee Benefits

The same group health plan benefits provided to an employee prior to taking FMLA leave shall be maintained during the FMLA leave (e.g., if family member coverage is provided to an employee, family member coverage shall be maintained during the FMLA leave). Similarly, benefit coverage during FMLA leave for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, etc., shall be maintained during leave if provided in the Corporation's group health plan, including a supplement to a group plan.

If an employee chooses not to retain group health plan coverage during FMLA leave, the employee will be reinstated, upon return from leave, on the same terms as prior to taking the leave, without any qualifying period, physical examination, exclusion of pre-existing conditions, etc.

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