PUBLIC LAW FOR THE PUBLIC'S LAWYERS

THE FAMILY AND MEDICAL LEAVE ACT
OCTOBER 12, 2017

Diane M. Juffras
School of Government
UNC-Chapel Hill
juffras@sog.unc.edu
(919) 843-4926

1. **Eligibility for FMLA Leave** ____ **1**
2. **What Is a Serious Health Condition?** ____ **3**
3. **Employee Notice Requirements** ____ **4**
4. **Employer Notice Requirements** ____ **5**
5. **Measuring an Employee's Available FMLA Entitlement** ____ **6**
6. **Medical Certification of the Need for FMLA Leave** ____ **6**
7. **Formal Designation of FMLA Leave** ____ **8**
8. **Intermittent or Reduced Schedule Leave** ____ **8**
9. **Substitution of Paid Leave** ____ **9**
10. **Health Insurance and Other Benefits** ____ **9**
11. **During FMLA Leave** ____ **10**
12. **Return to Work** ____ **10**
13. **Required Posting and Other Written Material** ____ **11**
14. **Military FMLA: Qualifying Exigency Leave** ____ **12**
15. **Military FMLA: Military Caregiver Leave** ____ **14**

THE FAMILY AND MEDICAL LEAVE ACT

29 U.S.C. §§ 2601-2654
29 C.F.R. Part 825

INTRODUCTION

The Family and Medical Leave Act (the FMLA) requires employers to grant eligible employees a total of twelve workweeks of job-protected, unpaid leave during any twelve-month period for one or more of the following reasons:

- the birth of a son or daughter of the employee or of a child for whom the employee will assume day-to-day care or financial support;
- the adoption of a son or daughter by the employee or placement of a child with the employee for foster care or the placement with an employee of a child for whom the employee will assume day-to-day care or financial support;
- the need for the employee to care for a spouse, child, or parent with a serious health condition (this does not include in-laws); or
- the employee's own serious health condition where the condition makes the employee unable to perform his or her job.

It also requires the employer to maintain the employee's group health insurance benefits on the same basis as if the employee was reporting for work rather than on a leave of absence.

The FMLA was originally enacted in 1993. In 2008, the FMLA was amended to add two additional forms of job-protected leave for the family members of American servicemen: qualifying exigency (QE) leave and military caregiver (MCG) leave. QE leave and MCG leave are discussed in a separate outline.

1. Eligibility for FMLA Leave

a. **The FMLA applies to *all* public employers, regardless of size**. 29 CFR §§ 825.104(a);825.108(d)

A public employer will be covered by the FMLA even if it does not have any eligible employees. Employees who work for public employers with fewer than fifty employees will work for an employer covered by the FMLA, but will not be entitled to FMLA leave.

b. **To be eligible for FMLA leave, an employee:**

- must have a total of at least twelve (12) months of service with the employer, although the twelve months need not be consecutive;
- must have worked at least 1,250 hours during the last 12 months; and
- must work at a worksite that has at least fifty (50) employees within a seventy-five (75) mile radius. 29 CFR § 825.11

2. What Is a Serious Health Condition?

a. **A serious health condition means** an illness, injury or impairment, or physical or mental condition that involves any period of incapacity:

- any period of incapacity requiring an absence from work of more than three full, consecutive calendar days that also involves continuing treatment by a health care provider;

  Continuing treatment means one in-person visit to a health care provider within the first seven (7) days of incapacity and either a second visit within the first thirty days or a regimen of continuing treatment under the supervision of a heath care provider.

- any period of incapacity or treatment connected with inpatient care;
- any period of incapacity due to pregnancy;
- any period of incapacity or treatment due to a chronic health condition such as asthma, diabetes, epilepsy;
- any period of incapacity that is long-term or permanent due to a condition for which treatment may not be effective (e.g., cancer; AIDS);
- any absence to receive multiple treatments (and to recover from the treatments) for a condition that would likely result in an incapacity for more than three consecutive days if left untreated (e.g., physical therapy, chemotherapy, dialysis).
  29 CFR §§ 825.112, 825.114 and 825.115

- FMLA leave is not available for colds, stomach viruses, the flu or similar conditions unless they require inpatient care or continuing treatment by a healthcare provider.
  29 CFR § 825.113

b. **Chronic or Episodic Conditions as Serious Health Conditions**

Some serious health conditions do not require an employee to be absent from work for continuous blocks of time. Treatments for chemotherapy, for example, usually take place periodically during regular business hours. Similarly, employees recovering from an illness or a surgical procedure may not be able to work a full day upon their initial return to work. Requests for intermittent or reduced-schedule leave must be granted when they are medically necessary (see below on intermittent and reduced-schedule leave).

3. Employee Notice Requirements

An employer may require an employee to give notice of the need for FMLA leave 30 days in advance, when the need for FMLA leave is foreseeable. 29 CFR §§ 825.302(a)

- If 30 days' notice is not possible, because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable.
- An employee may be required by an employer's policy to contact a specific individual or a third-party FMLA administrator.
- **Failure to comply with notice requirements** is only excused in unusual circumstances, such as when an employee is unable to comply with the employer's policy that requests for leave should be made by contacting a specific number because on the day the employee needs to provide notice of his or her need for FMLA leave there is no one to answer the call-in number and the voice mail box is full.
- An employer may require an employee to give notice of the need for FMLA leave either the same day or the next business day, **when the need for FMLA leave was not foreseeable**. Notice should generally be given within the usual and customary time notice requirements applicable to such leave. 29 CFR §§ 825.302(a) and (b); 825.303(a)
- An employer may delay the start of leave for an employee who fails to provide timely notice of the need for FMLA leave without a reasonable excuse. 29 CFR § 825.304
- An employer may require employees requesting FMLA leave to use its usual and customary notice and procedural requirements for requesting leave. If an employee fails to do so without a reasonable justification, the employer may delay or deny FMLA leave. This is true both with respect to foreseeable leave, unforeseeable leave and intermittent leave. 29 CFR § 825.302(d)
- **When an employee requests leave for planned medical treatment**, the employee must consult with the employer before scheduling the treatment in order to work out a schedule that meets the needs of both employee and employer, subject to the approval of the health care provider. 29 CFR § 825.302(e)
- These notice requirements apply both to traditional FMLA leave and military caregiver leave. Notice of the need for qualifying exigency leave must be as soon as practicable. 29 CFR § 825.302 See below for outline coverage of MCG and QE leave.

4. Employer Notice Requirements

An employer must notify an employee that s/he is eligible for FMLA leave within **five** business days after receiving a request for FMLA leave or within five days of acquiring knowledge than an employee is absent for an FMLA-qualifying reason.

- The employer notice of eligibility should be in writing.
- If an employee who has requested FMLA leave is **not** eligible**,** the eligibility notice must give at least one reason why the employee is not eligible (for example, the employee has not yet worked for the employer for 12 months). 29 CFR § 825.300(b)
- At the same time that the employer notifies an employee that s/he is eligible for FMLA leave, it must also give the employee a notice that details the specific rights and the specific expectations and obligations of the employee on FMLA leave.

The Notice of Eligibility and Rights and Responsibilities must include the following:

- **whether the employee must provide a medical certification**;
- whether the leave will count against the employee's 12-week FMLA entitlement;
- **whether the employer requires the use of accrued paid leave in lieu of unpaid leave**;
- that the employee may elect to use accrued paid leave in place of unpaid leave and any conditions related to the substitution of paid leave for unpaid leave (for example, that per the employer's policy, sick leave may only be used for an employee's own illness);
- whether the employee needs to make contributions toward health insurance premium payments and, if so, what arrangements the employee needs to make, as well as the consequences of a failure to make contribution payments and that the employee is liable for reimbursing the employer for the employer's health insurance contributions if the employee fails to return to work upon the conclusion of FMLA leave;
- that the employee has the right to return to the same or an equivalent job.

The notice may – but does not have to include other information, such as:

- whether the employee must provide periodic updates on his/her condition during the period of FMLA leave;
- whether the employee must provide a fitness-for-duty certification before returning to work. 29 CFR § 825.300(c)
- **Use US DOL's WH 381 to respond to employee requests for FMLA leave.** http://www.dol.gov/whd/fmla/finalrule/WH381.pdf. A copy is attached to this outline.

5. Measuring an Employee's Available FMLA Entitlement at Any Particular Time

To assess how much FMLA leave to which an employee is entitled at any particular time, employers may measure the "12-month period" in which the 12 weeks of leave occur using any of the following methods:

a. the calendar year;

b. any fixed 12-month "leave year" such as a fiscal year or year starting on employee's anniversary date of hire;

c. the 12-month period measured forward from the date the employee's first FMLA leave begins;

d. a "rolling" 12-month period measured backward from the date an employee uses FMLA leave.

The employer must apply the same method consistently and uniformly to all employees requesting FMLA leave. 29 CFR § 825.200(b)

6. Medical Certification of the Need for FMLA Leave

An employer may require employees to provide medical certification of the need for FMLA leave from the employee's health care provider subject to the following rules:

a. The employer must request the certification in writing **within five days of the employee's request** for FMLA leave (where the need for leave has been foreseeable) or within five days after the leave has begun (where the need for leave has not been foreseeable).

b. The employer must allow the employee 15 calendar days to obtain the certification.

c. If the employee does not return the certification within the 15-day window, the employee loses his or her right to FMLA leave and to return to the same or a substantially equivalent job. It would not be a violation of the FMLA to either deny FMLA leave or to fire an employee who has not returned a medical certification after 15 days, **although the regulations require an employer to make an exception when it has not been "practicable" for the employee to obtain the certification despite his/her diligent, good faith efforts to do so.** 29 CFR § 825.305(b)

d. An employer is entitled to a complete and sufficient certification. For a certification to be complete, all of the applicable entries must be filled out. A complete certification may still be insufficient if the information provided is vague, ambiguous or non-responsive.

e. If an employer receives an incomplete or insufficient certification, it must advise the employee in writing what additional information must be provided. The employee has seven (7) calendar days in which to provide the required information.

f. FMLA leave may be denied to any employee requesting leave who fails to return a medical certification or who fails to return a complete and sufficient certification after being given seven days to resubmit it. 29 CFR § 825.305(c) and (d)

g. The employer may require the employee to undergo an examination for a second opinion with a health care provider of the employer's choice at the employer's cost. If the employee's and the employer's healthcare provider disagree, the employee must obtain a certification from a third provider (jointly agreed upon by the employer and employee), again at the employer's cost. The decision of the third provider is binding. 29 CFR § 825.307(b) and (c)

h. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration. 29 CFR § 825.305(b)

i. At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. 29 CFR § 825.305(d)

Who qualifies as a health care provider for FMLA certification purposes? 29 CFR § 825.800.

– licensed MDs and ODs
– clinical psychologists
– nurse-midwives
– optometrists
– chiropractors (in certain cases)
– dentists
– clinical social workers
– nurse practitioners
– podiatrists
– official Christian Science practitioners

Recertifications:

Normally, an employer may not ask for recertification any more frequently than every 30 days. 29 CFR § 825.308

- If the initial certification is for more than 30 days, the employer must wait for the initial leave period set forth in the certification to run before asking for recertification.
- Recertification may only be required when employees are taking leave for their own serious health condition.

Medical Certification Forms: Use the US DOL Forms WH-380-E and 380-F.

- http://www.dol.gov/whd/forms/WH-380-E.pdf (employee's own serious health condition)
- http://www.dol.gov/whd/forms/WH-380-F.pdf (family member's serious health condition)

Copies are attached to this outline.

Confidentiality of Medical Certification Information:

Keep all FMLA-related medical information in a separate file. Wherever it is located, the medical information will be considered confidential under North Carolina's personnel records acts, but it will be easier to ensure that confidential medical information is not seen by persons reviewing an employee's personnel file for other legitimate reasons.

7. Formal Designation of Leave as FMLA Leave after Receipt of the Medical Certification

Once an employer has received a completed medical certification form, the employer must give the employee a separate **Designation Notice** advising the employee that the leave is being designated FMLA leave **within five business days**. Regardless of whether the information was included in the eligibility and rights and responsibilities notice, an employer must include the following information in the designation notice:

- whether accrued paid leave will be substituted for unpaid leave;
- whether the employee must provide a fitness-for-duty certification before returning to work;
- a list of the employee's essential job functions, if the fitness-for-duty certification must address the employee's ability to perform essential job functions;
  - **If details about the fitness-for-duty certification requirement are not included on the Designation Notice, the employer forfeits its right to a fit-for-duty certification.**
- Notice of the amount of leave that will be counted against the employee's FMLA entitlement. 29 CFR § 825.300(d)

US DOL's Designation Notice may be found at: www.dol.gov/whd/forms/WH-382.pdf. A copy is attached to this outline.

8. Intermittent and Reduced-Schedule Leave

Requests for intermittent or reduced-schedule leave must be granted when they are medically necessary.

- Intermittent leave is leave taken in separate blocks of time for a single qualifying reason.
- A reduced leave schedule is a temporary reduction in the number of hours that an employee works during the week.

a. When the need for intermittent or reduced-schedule leave is foreseeable based upon a planned course of medical treatment, the employer and employee are to attempt to work out a treatment schedule that does not unduly disrupt the employer's operations, subject to the approval of the medical provider. 29 CFR 825.302(f)

b. An employer must account for intermittent or reduced leave using the shortest period of time that it uses to account for other forms of leave (for example, sick, vacation, personal), but the period of time used to account for intermittent or reduced leave *cannot be greater than 1 hour increments*. 29 CFR § 825.205(a)

c. An employer may not require the employee to take more time off than is necessary to accommodate the need for the intermittent or reduced-schedule leave — if an employee only needs to be away from work for two hours a day, the employer may not require the employee to take a half-day off. *29 CFR § 825.203*

9. Substitution of Paid Leave

FMLA leave is unpaid, but FMLA leave may run concurrently with accrued sick or vacation leave and with absences taken in connection with workers' compensation claims. FLSA compensatory time off may also run concurrently with FMLA leave. 29 CFR § 825.207

- Employers may require employees to substitute as much paid leave as they have accrued to date for unpaid leave.
- Even if it not required by the employer, employees may choose to substitute as much paid leave as they have accrued to date for unpaid leave.
- Workers' compensation leave and short- or long-term disability leave are paid leaves, rather than unpaid leaves, although they usually pay only 2/3 of an employee's regular weekly wage. Because these are paid forms of leave, neither the employer nor the employee may unilaterally insist on the use of accrued paid leave to supplement the workers' comp or disability income replacement benefits when leave runs concurrently with FMLA leave. The employer and employee may, however, mutually agree to use paid accrued leave to supplement the benefits during FMLA leave.

10. Health Insurance and Other Benefits during FMLA Leave

An employer must cover an employee on FMLA leave under its group health insurance policy on the same terms as if the employee were working. 29 CFR § 825.209(a) and (b)

a. If the employer pays the entire premium for the employee, it must continue to do so.

b. If the employer pays any portion of family coverage, it must continue to pay its share.

c. The employee is responsible for making any contributions toward payment of the premium that s/he is normally required to make, even though the leave may be unpaid. Any employee who fails to make his/her contributions within 30 days may be dropped from coverage after the employer provides 15-days notice that coverage will be dropped. 29 CFR §§ 825.210 and 825.212

d. An employer may seek reimbursement for its health insurance premium contributions if the employee fails to return to work after FMLA leave, unless the employee fails to return to work because the serious health condition has not resolved or the employee has developed an additional serious health condition that makes him or her unable to work or due to other circumstances beyond the employee's control. 29 CFR 825.213

e. Employers are not required to maintain any other benefits during the period of FMLA leave.

f. An employee does not continue to accrue additional paid sick and vacation leave benefits during FMLA leave unless the employer's personnel policy specifically provides for accrual of benefits during other types of unpaid leaves of absence.

11. During FMLA Leave

a. ***Updates***:

- An employer may require either periodic updates about the employee's status and his/her intention to return to work or a medical recertification (at the employee's expense). 29 CFR § 825.311 (notice of intent to return to work)

b. ***No Light Duty***:

- The FMLA prohibits an employer from requiring an employee to take a light-duty assignment in lieu of FMLA leave. 29 CFR § 825.207(e)

c. ***Working a Second Job***: Employers sometimes learn to their dismay that an employee is working another job while on FMLA leave. What can they do? 29 CFR § 825.216(d) and (e).

- Employers may only restrict the kinds of activities that an employee on FMLA leave may engage in if there is a uniform policy of this kind applicable to all employees on leave of whatever kind. Thus, an employer may have a policy that says no employee on a leave of absence may be employed in any capacity during the leave and that violation of this policy may result in immediate termination of both the leave of absence (including FMLA leave) and employment.
- If an employer discovers that an employee is engaging in an activity that would appear impossible or prohibited if the reason for FMLA leave were true (for example, the medical certification form indicates that the employee needs complete bed rest for a month and the employee is seen playing in a softball game), the employer may terminate the FMLA leave and/or the employee.

12. Returning to Work

a. Fitness-for-Duty Certification

- An employer may require that an employee who has been on FMLA leave because of the employee's own serious health condition return a fitness-for- duty certification before returning to work. *29 CFR § 825.312*
- The certification must be limited to the condition that caused the need for FMLA leave and must be required pursuant to a uniformly-applied written policy applicable to all similarly-situated employees – for example, to all employees on leave in excess of three weeks, to all public-safety employees, to all employees returning after surgery.
- The employer may require that a health care provider certify the employee's ability to perform his or her essential job duties.

- The requirement of a fitness-for-duty certification and a list of essential job functions, if certification of the ability to perform essential functions is required, must be given to the employee not later than with the designation letter. 29 CFR § 825.312(b)
- For intermittent or reduced leave FMLA absences taken on an intermittent or reduced leave schedule, an employer may require a fitness-for-duty certification once every 30 days if reasonable safety concerns exist. 29 CFR § 825.312(f)

b. ***Upon conclusion of FMLA leave, employees have the right to return to the same or an equivalent job***. 29 CFR §§ 825.214 and 825.215

- Equivalent means virtually identical to the original job in terms of pay, benefits and other employment terms and conditions. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility and authority.

c. ***Employers are not required to continue an FMLA leave or to return a person to work if the employee would have been terminated had they continued to work*** — if, for example, the employee's position were being eliminated as part of a restructuring or a reduction-in-force. 29 CFR § 825.216(a)

13. Information that Must Be Posted or Otherwise Provided to All Employees. 29 CFR § 825.300

a. ***Required Posting***

Employers must post US DOL WH Publication 1420, which explains rights and responsibilities under the FMLA in a place conspicuous to all employee and applicants. It is available at http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf. Electronic posting is permitted, provided that all employees and applicants have access to it. If the post is made on an employer intranet, the employer must post a hard-copy of the notice in a place where it will be seen by applicants. The US DOL is authorized to fine employers who fail to post this notice.

b. ***Required Written Materials***

Employers must either include material explaining employer and employee rights and responsibilities under the FMLA **in employee manuals** or other written material distributed to employees or provide written guidance about the FMLA **whenever** an employee makes a general request for leave. Use Fact Sheet No. 28: http://www.dol.gov/whd/regs/compliance/whdfs28.pdf.

QUALIFYING EXIGENCY LEAVE AND MILITARY CAREGIVER LEAVE

Qualifying Exigency Leave

The FMLA also requires employers to grant **up to twelve weeks of leave** for certain qualifying exigencies **to employees whose *spouse, child of any age, or parent* is a military service member under a call or order to federal active duty and are being deployed to a foreign country**. This form of FMLA leave is known as ***qualifying exigency leave***. In general, qualifying exigency leave is designed to give employees time to deal with some of the informational, financial and child-related issues that arise when a family member is called to or on active duty.

The U.S. Department of Labor's FMLA regulations define *qualifying exigency* as:

- deployment of a service member to a foreign country with seven or fewer days' notice;
- military ceremonies and events, as well as support, family-assistance or informational programs related to a service member's active duty or call to active duty status in connection with a foreign deployment;
- providing urgent, immediate childcare/parental care or arranging for alternative childcare/ parental care for the children/parent of service members on or called to active duty for deployment abroad;
- attending school, daycare/care facility meetings relating to the child/parent of a service member on or called to active duty for deployment abroad;
- making financial or legal arrangements related to a service member's active duty status or call to active duty for deployment abroad;
- counseling sessions related to a service member's active duty status or call to active duty;
- post-deployment activities for a period of ninety days after the termination of the service member's foreign deployment; or
- spending time with military member who is on rest and recuperation leave during deployment.

Qualifying exigency leave may be taken on an intermittent or reduced schedule. 29 CFR 825.126

Who May Take Qualifying Exigency Leave?

Qualifying exigency leave is available to employees whose *spouse, child of any age or parent* is a military service member under a call or order to federal active duty for deployment to a foreign country. *Qualifying exigency leave is limited to situations in which a call or order to active duty status is in support of a contingency operation.* The active duty orders of a service member will generally say whether he or she is serving in support of a contingency operation.

Qualifying exigency leave now applies to the family members of all members of the armed forces, including the regular armed forces as well as those serving in the Reserve components of the armed forces, and the National Guard. 29 CFR 825.126

Notice of the Need to Take Qualifying Exigency Leave:
Notice of the need for qualifying exigency leave must be "as soon as practicable." There is requirement that leave be foreseeable. *This is a different standard than that applied to FMLA or military caregiver leave.* 29 CFR 825.302

Certification for Qualifying Exigency Leave. Employers may require employees requesting qualifying exigency leave to provide:

1. a copy of the military member's active duty orders or other documentation issued by the military indicating that the military member is on or called to active duty and will be deployed abroad and the dates of the deployment, **and**

2. a certification from the employees setting forth:

    a. facts supporting the employee's need for leave in this situation (does the employee need, for example, to attend military briefings for family members, meet with a counselor or school official, or meet with a lawyer or financial advisor);

    b. the approximate starting date on which the qualifying exigency began or will begin;

    c. the beginning and end dates of the absence for which the employee is requesting FMLA qualifying exigency leave;

    d. if the employee is meeting with a third-party, identifying and contact information for the third-party and a description of the meeting's purposes.

An employer may <u>not</u> request recertification of the covered service member's orders. It may, however, request certification of each individual qualifying exigency arising out of the same call to duty.

Use U.S. DOL Form WH-384 Certification of Qualifying Exigency Leave.

Note that certification of the need for qualified exigency leave is subject to the same time requirements as FMLA leave: the employer must request the certification in writing within five days of the request for or beginning of leave and the certification must be completed and returned within fifteen days of its receipt from the employer. 29 CFR 825.309

Military Caregiver Leave

FMLA-eligible employees may take **up to 26 weeks of leave within a twelve-month period** to care for a family member who has been injured or become ill while serving in the armed forces.

Covered Service Members

Employees may take military caregiver leave to care for current members or veterans of:

- the regular Armed Forces,
- the National Guard or Reserves, and
- the regular Armed Forces or National Guard or Reserves who are on the disability retired list, who have a serious injury or illness incurred in the line of duty on active duty (or have a preexisting condition that was aggravating during active duty) that renders them medically unfit to perform the duties of his or her office, grade or rating, and for which the service member is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status or is otherwise on the disability retired list.

  Veterans must have been discharged or released within five years of date on which the veteran begins medical treatment, recuperation or therapy for injuries or illness incurred in the line of duty.

Who Can Take Leave?

The spouse, "son or daughter of a covered service member," "parent of a covered service member" or "next of kin of a covered service member."

These are terms of art used only in the context of military caregiver leave and are different from the definitions of "son," daughter" or "parent" as used elsewhere in the context of the FMLA.

a. "Son or daughter of a covered service member" means biological, adopted, foster, stepchild, legal word or a child for whom the service member stood *in loco parentis*. The child may be of any age.

b. "Parent" means biological, adoptive, step or foster father or mother or any other person who stood *in loco parentis* to the employee and, as elsewhere in the FMLA, does not include in-laws.

c. "Next of kin" means nearest blood relative other than spouse, son, daughter or parent in order of priority set out in 29 CFR 825.127(d)(3).

Notice of the Need for Military Caregiver Leave

An employer may require an employee to give notice of the need for military caregiver leave:

- 30-days in advance, when the need for military caregiver leave is foreseeable.
- Either the same day or the next business day, when the need for leave was not foreseeable.
- This is the same notice requirement as applies to FMLA leave for the serious health condition of an employee or of an employee's immediate family member.
- An employer may require employees requesting military caregiver leave to use its usual and customary notice and procedural requirements for requesting leave. If an employee fails to do so without a reasonable justification, the employer may delay or deny leave. 29 CFR 825.302

Certification for Military Caregiver Leave

An employer may ask an employee requesting military caregiver leave to provide a medical certification of the need for leave from the healthcare provider of the service member.

1. For the purposes of military caregiver leave, the healthcare providers who may complete the certification include Department of Defense providers, Department of Veterans Affairs providers, TRICARE network authorized private providers, and non-network TRICARE authorized private providers.

2. Pursuant to 29 CFR § 825.310(b) and (c), medical certifications for military caregiver leave may ask information sufficient to establish the employee's need for leave, including the following:

    a. A statement of medical facts regarding the service members health condition – specifically, facts relating to whether the injury or illness renders the service member medically unfit to perform the duties of his or her military office, grade,rank or rating and whether the member is receiving medical treatment, recuperation or therapy;

    b. Information sufficient to establish that the service member is in need of care;

    c. A description of the care to be provided to the service member and an estimate of the leave needed to provide the care; and

    d. The relationship of the employee to the service member.

3. Certification of the need for military caregiver leave is subject to the same time requirements as FMLA leave: the employer must request the certification in writing within five days of the request for or beginning of leave and the certification must be completed and returned within fifteen days of its receipt from the employer.

For military caregiver leave, use U.S. DOL Forms WH-385 (current service member), WH-385-V (veteran). 29 CFR 825.310

Four Important Points about Military Caregiver Leave

1. The timing requirements for certification are the same as those for FMLA leave. The employee must return the certification of the need for military caregiver leave within fifteen calendar days after receiving the form from the employer.

2. In contrast to FMLA leave, second and third opinions are not permitted for military caregiver leave. Some exceptions apply. 29 CFR 825.310(d)

3. Again in contrast to FMLA leave, recertifications are not permitted for military caregiver leave. 29 CFR 825.310(d)

4. An employer requiring certification for military caregiver leave, must accept "invitational travel orders" (ITOs) or invitational travel authorizations (ITAs) issued to a family member to join an ill or injured service member at his or her bedside in lieu of the DOL's certification form or the employer's own certification form. 29 CFR 825.310(e)

Calculating the Amount of Military Caregiver Leave an Employee May Take.

- The employee is eligible for 26 weeks of leave to care for the service member during a single twelve-month period.

- This is a limit of one-time per covered service member per injury.

- An employee may be eligible to take 26 weeks of leave in a subsequent year to care for a different family member or to care for the original covered service member who has suffered a subsequent injury upon return to duty.

- If the covered service member needs care for the original injury beyond the initial 26 weeks of military caregiver leave, the employee may be able to use his or her 12-week FMLA entitlement in a subsequent year to care for the service member s an immediate family member with a serious health condition.

- The employee is entitled to a combined total of 26 workweeks of leave for any FMLA-qualifying reason in a year in which she or he takes military caregiver leave.

- The single twelve-month period begins the first day the employee takes military caregiver leave and ends twelve months later, regardless of the method that the employer uses to determine FMLA entitlement for other forms of FMLA leave.

- Military caregiver leave may be taken on an intermittent or reduced leave schedule. 29 CFR 825.200(f), (g), 825.127(e)