

Employment Law Update: Recent Changes in the FMLA and ADA
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I. New Family and Medical Leave Act regulations became effective January 16, 2009.

1. ***Use of FLSA comp time now allowed:***

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. The new regulations now allow FLSA compensatory time off to also run concurrently with FMLA leave. For substitution of paid leave, See 29 CFR § 825.207.

2. ***Change in the definition of a "serious health condition":***

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* means 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 health care provider.

3. ***New separate DOL medical certification forms for employee's and family member's serious health condition.***

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

<http://www.dol.gov/esa/whd/forms/WH-380-E.pdf> (employee's own serious health condition)

<http://www.dol.gov/esa/whd/forms/WH-380-F.pdf> (family member's serious health condition)

4. ***Clarification that FMLA w/ concurrent workers' comp, disability or ADA leave may request any greater medical information permitted under those statutes or programs.***

5. ***Clarification that a list of essential functions may be attached to medical certification.***

6. ***Employees now have opportunity to cure insufficient certification.***

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). 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.

- 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.
- 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.
See 29 CFR § 825.305(c) and (d).

7. ***Direct contact with employee's provider by HR now permitted.***

8. ***Fitness-for-duty certifications may now address ability to perform essential functions.***
The certification must be limited to the condition that caused the need for FMLA leave and must be required pursuant to a uniformly-applied 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.
See 29 CFR § 825.312(b).

II. Regulations Covering Two New Forms of FMLA Leave

A. Qualifying Exigency Leave

- Up to twelve weeks of leave
 - For employees whose *spouse, child of any age or parent* is a military service member under a call or order to federal active duty in support of a contingency operation
1. For Certain Qualified Exigencies: Exclusive List
 - a. Deployment of service member with 7 or fewer days notice;
 - b. Military ceremonies and events such as family-assistance or informational programs related to the family member's active duty or call to active duty;
 - c. Urgent, immediate childcare or arranging for alternative childcare for the children of service members;
 - d. Attending school or daycare meetings relating to the child of service member;
 - e. Making financial or legal arrangements related to a family member's active duty status or call to active duty; or
 - f. Post-deployment activities for a period of ninety days after the termination of the service member's active duty status.

2. Certification of Qualifying Exigency Leave: An Employer May Ask for
 - a. a copy of active duty orders or other documentation issued by the military indicating that the military member is on or called to active duty in support of a contingency operation and the dates of active duty service, **and**
 - b. a **certification** from *the employee setting forth*:
 - i) facts supporting employee's need for leave in this situation;
 - ii) the approximate starting date on which the qualifying exigency began or will begin;
 - iii) the beginning and end dates of the absence for which the employee is requesting qualifying exigency leave;
 - iv) 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.

B. Military Caregiver Leave

1. **Basic Concept:** FMLA-eligible employees may take up to 26 weeks of leave within a 12-month period to care for a family member who is a current member of the armed forces and who has been injured or become ill in the line of duty.
2. The military service member for whom the employee will care must have a serious injury of illness incurred in the line of duty on active duty that makes him/her medically unfit to perform the duties of his or her office, grade or rating.
3. Compare to the requirement for FMLA leave for an employee's own serious health condition: "because of a serious health condition that makes the employee unable to perform the functions of the employee's job."
4. The military service member must also:
 - a. be undergoing medical treatment, recuperation or therapy;
 - b. be otherwise in outpatient status, or
 - c. be otherwise on the temporary disability retired list.
5. Which Family Members Can Take Military Caregiver Leave:
 - a. Spouse
 - b. Son or daughter includes foster and step- children, legal wards or any child for whom the service member stood in loco parentis
 - c. Parent includes foster and step-parents and any other person who stood in loco parentis to the employee
 - d. Next of kin.

6. Notice and Certification of Military Caregiver Leave
 - a. Notice provisions are the same as for FMLA leave
 - b. Certification: Employer may require certification from following providers of the military service member:
 - i) DOD providers
 - ii) VA providers
 - iii) TRICARE network and non-network authorized private providers
 - c. Timeframes the same as for FMLA leave
7. Military Caregiver Certifications may ask for the following information:
 1. Statement of medical facts concerning the military service member's condition specifically related to their ability to perform the duties of their military position;
 2. Information sufficient to establish that the service member needs care;
 3. A description of the care that the employee will provide to the service member and an estimate of the amount of leave needed; and
 4. The relationship of the employee to the service member.
 5. Use DOL Form 385: Certification of the Need for Military Caregiver:
<http://www.dol.gov/esa/whd/forms/WH-385.pdf>
 - i) Employers must accept DoD Invitational Travel Orders (ITOs) or Invitational Travel Authorizations (ITAs) in lieu of a certification.
8. Amount of Military Caregiver Leave Allowed
 - a. Limit of one-time per service member per injury
 - b. Total of 26 workweeks of combined FMLA, qualifying exigency and military caregiver leave in any twelve-month in which an employee takes military caregiver leave
 - c. The twelve-month period begins on the first day that an employee takes military caregiver leave and ends twelve-months later, regardless of method of calculating FMLA year.