

QUESTIONS AND ANSWERS – MILITARY FAMILY LEAVE - FMLA

Following are answers to common questions about the military family leave provisions of the new Family and Medical Leave Act (FMLA) regulations.

Q1. What are the military family leave provisions of the FMLA?

A1. On January 28, 2008, President Bush signed into law new FMLA leave entitlements for military families (“military family leave provisions”). The National Defense Authorization Act for FY 2008 (“NDAA”), Public Law 110-181, amended the FMLA to provide two types of military family leave for FMLA-eligible employees. The new FMLA regulations include these two types of military family leave referred to as “qualifying exigency leave” and “military caregiver leave.”

Q2. Are all employees of a covered employer entitled to take military family leave?

A2. No. To be eligible to take FMLA leave for any qualifying reason, an employee of a covered employer must have worked for the employer for a total of 12 months, have worked at least 1,250 hours over the previous 12 months, and work at a location where at least 50 employees are employed by the employer within 75 miles. See the general FMLA FAQ at www.dol.gov/esa/whd/fmla/finalrule.htm for additional information regarding employee eligibility.

Q3. Is military family leave paid?

A3. No. The FMLA only requires unpaid leave. However, the law permits an employee to elect, or the employer to require the employee, to use accrued paid leave for some or all of the FMLA leave period. An employee’s ability to elect to use accrued paid leave during a period of FMLA leave is determined by the terms and conditions of the applicable paid leave policy.

Qualifying Exigency Leave

Q4. What is “qualifying exigency leave”?

A4. “Qualifying exigency leave” is one of the two new military family leave provisions. It may be taken for any qualifying exigency arising out of the fact that a covered military member is on active duty or call to active duty status.

The new regulations include a broad list of activities that are considered qualifying exigencies and will permit eligible employees who are family members of a covered military member to take FMLA leave to address the most common issues that arise when a covered military member is deployed, such as attending military-sponsored functions, making appropriate financial and legal arrangements, and arranging for alternative childcare.

Q5. What is a “qualifying exigency”?

A5. The Department of Labor has developed a list of qualifying exigencies that encompass a wide range of specific activities in the following broad categories. Qualifying exigencies include:

- Issues arising from a covered military member’s short notice deployment for a period of seven days from the date of notification;
- 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;
- Certain childcare and related activities arising from the active duty or call to active duty status of a covered military member, such as arranging for alternative childcare, providing childcare on a non-routine, urgent, immediate need basis, enrolling or transferring a child in a new school or day care facility, and attending certain meetings at 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;
- Making or updating financial and legal arrangements to address a covered military member’s absence;
- Attending counseling provided by someone other than a health care provider for oneself, the covered military member, or the child of the covered military member, the need for which arises from the active duty or call to active duty status of the covered military member;
- Taking up to five days of leave to spend time with a covered military member who is on short-term temporary, rest and recuperation leave during deployment

- 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 90 days following the termination of the covered military member's active duty status, and addressing issues arising from the death of a covered military member; and
- Any other event that the employee and employer agree is a qualifying exigency.

Q6. Who is a “covered military member”?

A6. A covered military member is the employee's spouse, son, daughter, or parent who is on active duty or call to active duty status.

Q7. What is “active duty or call to active duty status”?

A7. Active duty or call to active duty status refers to a member of the National Guard or Reserves who is under a call or order to active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation.

Q8. Are families of servicemembers in the Regular Armed Forces eligible for qualifying exigency leave?

A8. No. The statute passed by Congress providing these new military family leave entitlements only extended the right to take FMLA leave because of a qualifying exigency to family members of National Guard and Reserves, and certain retired military.

Q9. Can I take qualifying exigency leave if my son or daughter is 18 years old or older?

A9. Yes. The new FMLA regulations contain special definitions for son and daughter for both of the military family leave provisions. For qualifying exigency leave, an eligible employee may take leave for his or her “son or daughter on active duty or call to active duty status,” which is defined as the employee's biological, adopted, or foster child, stepchild, legal ward, or child for whom the employee stood in loco parentis, who is on active duty or call to active duty status, and who is of any age.

Q10. Can I take qualifying exigency leave if the covered military member is my stepson or stepdaughter? Alternatively, can I take qualifying exigency leave if the covered military member is my stepparent?

A10. Yes. Under the FMLA for qualifying exigency leave, a “son or daughter on active duty or call to active duty status” means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on active duty or call to active duty status, and who is of any age. Additionally, under the FMLA for qualifying exigency leave, a “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. This term does not include parents “in law.”

Q11. How will I know whether a covered military member has been called to or is on active duty in support of a “contingency operation?”

A11. A covered military member’s active duty orders will generally specify whether he or she is serving in support of a contingency operation. You also may confirm whether a particular servicemember is serving in support of a contingency operation by contacting the appropriate military branch.

Q12. Can I take qualifying exigency leave to pick up a child from school or attend a school event?

A12. Yes, in certain limited circumstances. An eligible employee caring for a covered military member’s child may use qualifying exigency leave to provide childcare on an urgent, immediate need basis, but not on a routine, everyday basis, where the need to provide the care arises from the active duty or call to active duty status of the covered military member. Accordingly, an employee could use qualifying exigency leave to provide childcare in an emergency, such as a school closure due to inclement weather, if the employee’s need to provide the care arises from the active duty status of a covered military member.

Qualifying exigency leave could not be used, however, on a routine basis to provide daily childcare after school hours (although it could be used temporarily while making arrangements for such care). Qualifying exigency leave may also be used to attend certain meetings with school staff, if those meetings are necessary due to the active duty or call to active duty status of the covered military member. For example, qualifying exigency leave could be used to attend a meeting with a teacher to discuss behavioral problems related to the child’s parent being deployed. Qualifying exigency leave may not be used, however, for attending routine school events, such as birthday parties or plays.

Q13. For what additional events may employers and employees agree to use qualifying exigency leave?

A13. Employers and employees may agree to cover any additional events arising from the covered military member’s active duty or call to active duty status as qualifying exigency leave. Such events may include leave to spend time with a covered military member either prior to or post deployment, or to attend to household emergencies that would normally have been handled by the covered military member. Employers and employees must agree to both the timing and duration of any such qualifying exigency leave and the leave may be counted against the employee’s 12 week FMLA leave entitlement.

Q14 What type of notice must I provide to my employer when taking FMLA leave because of a qualifying exigency?

- A14. An employee must provide notice of the need for qualifying exigency leave as soon as practicable. For example, if an employee receives notice of a family support program a week in advance of the event, it should be practicable for the employee to provide notice to his or her employer of the need for qualifying exigency leave the same day or the next business day. When the need for leave is unforeseeable, an employee must comply with an employer's normal call-in procedures absent unusual circumstances.

An employee does not need to specifically assert his or her rights under FMLA, or even mention FMLA, when providing notice. The employee must provide "sufficient information" to make the employer aware of the need for FMLA leave and the anticipated timing and duration of the leave.

Q15. What are the certification requirements for taking qualifying exigency leave?

- A15. The first time an employee requests qualifying exigency leave, an employer may require the employee to provide a copy of the covered military member's active duty orders or other documentation issued by the military that indicates the covered military member is on active duty or call to active duty status in support of a contingency operation, and the dates of the covered military member's active duty service.

In addition, each time an employee first requests leave for one of the qualifying exigencies, an employer may require certification of the exigency necessitating leave. Certification supporting leave for a qualifying exigency includes: appropriate facts supporting the need for leave, including any available written documentation supporting the request; the date on which the qualifying exigency commenced or will commence and the end date; where leave will be needed on an intermittent basis, the frequency and duration of the qualifying exigency; and appropriate contact information if the exigency involves meeting with a third-party. A new optional Department of Labor (DOL) form (WH-384) has been developed for employees' use in obtaining certification that meets qualifying exigency leave certification requirements.

Q16. Are the certification procedures (timing, authentication, clarification, second and third opinions, recertification) the same for qualifying exigency leave and leave due to a serious health condition?

- A16. The same timing requirements for certification apply to all requests for FMLA leave, including those for military family leave. An employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

If the qualifying exigency involves a meeting with a third party, employers may verify the schedule and purpose of the meeting with the third party. Additionally, an employer may contact the appropriate unit of the Department of Defense to confirm that the covered military member is on active duty or call to active duty status.

Employers are not permitted to require second or third opinions on qualifying exigency certifications. Employers are also not permitted to require recertification for such leave.

Q17. How much FMLA leave may I take for qualifying exigencies?

A17. An employee may take up to 12 workweeks of FMLA leave for qualifying exigencies during the twelve-month period established by the employer for FMLA leave. Qualifying exigency leave may also be taken on an intermittent or reduced leave schedule basis.

Q18. Is the 12 weeks of qualifying exigency leave a one-time entitlement?

A18. No. If a covered military member's active duty or call to active duty status spans more than one FMLA leave year, an eligible employee would be eligible to take qualifying exigency leave in each FMLA leave year. Moreover, an eligible employee could take qualifying exigency leave in a subsequent FMLA leave year for a different covered military member. Finally, if the same covered military member returns from deployment and is subsequently redeployed, the eligible employee would again be entitled to qualifying exigency leave.

Q19. How much leave can I take if I need leave for both a serious health condition and a qualifying exigency?

A19. Qualifying exigency leave, like leave for a serious health condition, is a FMLA-qualifying reason for which an eligible employee may use his or her entitlement for up to 12 workweeks of FMLA leave each year. An eligible employee may take all 12 weeks of his or her FMLA leave entitlement as qualifying exigency leave or the employee may take a combination of 12 weeks of leave for both qualifying exigency leave and leave for a serious health condition.

Q20. Can I take qualifying exigency leave when my "covered military member" returns from deployment?

A20. Yes. An eligible employee is entitled to take qualifying exigency leave for certain qualifying post-deployment exigencies, including reintegration activities, for a period of 90 days following the termination of the covered military member's active duty status.

Military Caregiver Leave

Q21. What is “military caregiver leave”?

A21. Military caregiver leave” is the second of the two new military family leave provisions. Such leave may be taken by an eligible employee to care for a covered servicemember with a serious injury or illness. This type of FMLA leave is based on a recommendation of the President’s Commission on Care for America’s Returning Wounded Warriors.

Q22. Who is eligible to take military caregiver leave?

A22. An eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember with a serious injury or illness may take job-protected FMLA leave to provide care to the servicemember.

Q23. Are families of servicemembers in the Regular Armed Forces eligible for military caregiver leave?

A23. Yes. Military caregiver leave extends to those seriously injured or ill members of both the Regular Armed Forces and the National Guard or Reserves.

Q24. Who is a “covered servicemember”?

A24. A “covered servicemember” is a 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 incurred in the line of duty on active duty.

Q25. Can I take military caregiver leave if I am the stepson or stepdaughter of the covered servicemember or if I am the stepparent of a covered servicemember?

A25. Yes. Under the FMLA for military caregiver leave, a “son or daughter of a covered servicemember” means a covered servicemember’s biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, and who is of any age. Under the FMLA for military caregiver leave, a “parent of a covered servicemember” means a covered servicemember’s biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents “in law.”

Q26. What is a “serious injury or illness”?

A26. A “serious injury or illness” is an injury or illness incurred by a covered servicemember in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of the member’s office, grade, rank, or rating.

Q27. How much leave may I take to care to for a covered servicemember?

A27. An eligible employee is entitled to take up to 26 workweeks of leave during a “single 12-month period” to care for a seriously injured or ill covered servicemember. The “single 12-month period” begins on the first day the eligible employee takes military caregiver leave and ends 12 months after that date, regardless of the method used by the employer to determine the employee’s 12 workweeks of leave entitlement for other FMLA-qualifying reasons.

Q28. May I take FMLA leave to both care for a covered servicemember and for another FMLA qualifying reason during this “single 12-month period?”

A28. Yes. The regulations provide that an eligible employee is entitled to a combined total of 26 workweeks of military caregiver leave and leave for any other FMLA-qualifying reason in this “single 12-month period,” provided that the employee may not take more than 12 workweeks of leave for any other FMLA-qualifying reason during this period. For example, in the single 12-month period an employee could take 12 weeks of FMLA leave to care for a newborn child and 14 weeks of military caregiver leave, but could not take 16 weeks of leave to care for a newborn child and 10 weeks of military caregiver leave.

Q29. Can I carry-over unused weeks of military caregiver leave from one 12-month period to another?

A29. No. If an employee does not use his or her entire 26-workweek leave entitlement during the “single 12-month period” of leave, the remaining workweeks of leave are forfeited. After the end of the “single 12-month period” for military caregiver leave, however, an employee may be entitled to take FMLA leave to care for the covered military member if the member is a qualifying family member under non-military FMLA and he or she has a serious health condition.

Q30. Can I take military caregiver leave as the son or daughter of a covered servicemember if I am 18 years old or older?

A30. Yes. The new FMLA regulations contain special definitions for son and daughter for both of the military family leave provisions. For military caregiver leave, an eligible employee may take leave if he or she is the “son or daughter of a covered servicemember,” which is defined as the covered servicemember’s biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age.

Q31. Who is a servicemember’s “next of kin” for purposes of military caregiver leave?

A31. The regulations define a covered servicemember’s “next of kin” as the servicemember’s nearest blood relative, other than the covered servicemember’s spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under FMLA, in which case the designated individual shall be deemed to be the covered servicemember’s next

of kin. The regulations provide that all family members sharing the closest level of familial relationship to the covered servicemember shall be considered the covered servicemember's next of kin, unless the covered servicemember has specifically designated an individual as his or her next of kin for military caregiver leave purposes. In the absence of a designation, where a covered servicemember has three siblings, for example, all three siblings will be considered the covered servicemember's next of kin.

Q32. Can I take military caregiver leave to care for a servicemember who is no longer serving in the military? What about for a retired member of the military?

A32. No. Former members, including retired members, of the Regular Armed Forces, the National Guard, or the Reserves are not considered "covered servicemembers" under the military caregiver leave provision. Military caregiver leave does cover seriously ill or injured servicemembers on the temporary disability retired list; servicemembers on the permanent disability retired list, however, are not covered.

Q33. Can I take military caregiver leave for more than one seriously injured or ill servicemember, or more than once for the same servicemember if he or she has a subsequent serious injury or illness?

A33. Yes. By regulation, military caregiver leave is a "per-servicemember, per-injury" entitlement. Accordingly, an eligible employee may take 26 workweeks of leave to care for one covered servicemember in a "single 12-month period," and then take another 26 workweeks of leave in a different "single 12-month period" to care for another covered servicemember. An eligible employee may also take 26 workweeks of leave to care for a covered servicemember in a "single 12-month period," and then take another 26 workweeks of leave in a different "single 12-month period" to care for the same servicemember with a subsequent serious injury or illness (e.g., if the servicemember is returned to active duty and suffers another injury).

Q34. Can I take additional military caregiver leave if a covered servicemember receives a serious injury or illness and then, at a later time, manifests a second serious injury or illness?

A34. Yes. If a covered servicemember incurs a serious injury or illness and manifests a second serious injury or illness at a later time, an eligible employee would be entitled to an additional 26-workweek entitlement to care for the covered servicemember in a separate "single 12-month period." However, the covered servicemember must still be a member of the Armed Forces, or the National Guard or Reserves, including those on the temporary disability retired list, and the second serious injury or illness must have been incurred in the line of duty on active duty. For example, an eligible employee may take military caregiver leave to care for a covered servicemember who has suffered a limb amputation in the line of duty on active duty; if that same servicemember manifests a brain injury a year later arising from the same incident, the employee would be eligible to take another 26 workweeks of military caregiver leave at that time.

Q35. Can I care for two seriously injured or ill servicemembers at the same time?

A35. Yes. However, an eligible employee may not take more than 26 workweeks of leave during each "single 12-month period."

Q36. What type of notice must I provide to my employer when taking military caregiver FMLA leave because of a qualifying exigency?

A36. An employee must provide 30 days advance notice of the need to take FMLA leave for planned medical treatment for a serious injury or illness of a covered servicemember . When 30 days advance notice is not possible, the employee must provide notice as soon as practicable taking into account all of the facts and circumstances. When the need for leave is unforeseeable, an employee must comply with an employer's normal notice or call-in procedures, absent unusual circumstances.

An employee does not need to specifically assert his or her rights under FMLA, or even mention FMLA, when providing notice. The employee must provide "sufficient information" to make the employer aware of the need for FMLA leave and the anticipated timing and duration of the leave.

Q37. Are there certification requirements for taking military caregiver leave?

A37. Yes. When leave is taken to care for a covered servicemember with a serious injury or illness, an employer may require an employee to obtain a certification completed by an authorized health care provider of the covered servicemember. A new optional DOL form (WH-385) has been developed for employees' use in obtaining certification that meets military caregiver leave certification requirements. This optional form reflects certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave to care for a covered servicemember with a serious injury or illness.

Q38. Are the certification procedures (timing, authentication, clarification, second and third opinions, recertification) the same for military caregiver leave and leave due to a serious health condition?

A38. The same timing requirements for certification apply to all requests for FMLA leave, including those for military family leave. Thus, an employee must provide any requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

The regulations also permit employers to authenticate and clarify medical certifications submitted to support a request for military caregiver leave using the procedures applicable to FMLA leave taken to care for a family member with a serious health condition.

Employers are not permitted to require second or third opinions on military caregiver leave. Employers are also not permitted to require recertification for such leave.

Q39. Are private health care providers, as well as military health care providers, permitted to complete a certification for military caregiver leave?

A39. Yes. A private health care provider can complete certifications for military caregiver leave if the health care provider is either a DOD TRICARE network authorized private health care provider or a DOD non-network TRICARE authorized private health care provider. Department of Defense health care providers and Veterans Affairs health care providers can also complete a certification for military caregiver leave. See 29 CFR 827.310(a).

Q40. What if my covered servicemember receives a catastrophic injury and the military issues me travel orders to immediately fly to Landstuhl Regional Medical Center in Germany to be at his bedside. Do I have to provide a completed certification before flying to Germany?

A40. No. Given the seriousness of the injuries or illnesses incurred by a servicemember whose family receives an “invitational travel order” (ITO) or “invitational travel authorization” (ITA), and the immediate need for the family member at the servicemember’s bedside, the regulations require an employer to accept the submission of an ITO or ITA, in lieu of the DOL optional certification form or an employer’s own form, as sufficient certification of a request for military caregiver leave during the time period specified in the ITO or ITA.

The regulations also permit an eligible employee who is a spouse, parent, son, daughter or next of kin of a covered servicemember to submit an ITO or ITA issued to another family member as sufficient certification for the duration of time specified in the ITO or ITA, even if the employee seeking leave is not the named recipient on the ITO or ITA.

If the covered servicemember’s need for care extends beyond the expiration date specified in the ITO or ITA, the regulations permit an employer to require an employee to provide certification for the remainder of the employee’s leave period.

Q41. How is leave designated if it qualifies as both military caregiver leave and leave to care for a family member with a serious health condition?

A41. For military caregiver leave that also qualifies as leave taken to care for a family member with a serious health condition, the regulations provide that an employer must designate the leave as military caregiver leave first. Applying military caregiver leave first will help to alleviate some of the administrative issues caused by the running of the separate “single 12-month period” for military caregiver leave.

The regulations also prohibit an employer from counting leave that qualifies as both military caregiver leave and leave to care for a family member with a serious health condition against both an employee’s entitlement to 26 workweeks of military caregiver leave and 12 workweeks of leave for other FMLA-qualifying reasons.