

Qualifying Request for Leave

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Overview

Once you have determined that an employee who has requested leave is currently eligible for leave, you have provided your employee the [Notice of Eligibility and Rights & Responsibilities](#), and the employee has timely returned any supporting documentation you have required, your next step is to determine if the employee's request for leave is based on a qualifying FMLA reason. As you will see, this determination may not always be easy, so it is important to consult with an experienced HR specialist or attorney knowledgeable in FMLA before giving your employees your determination.

Traditional FMLA Leave

To review, employers must provide an eligible employee with up to 12 weeks of unpaid leave each year for any of the following reasons:

- For the birth and care of the newborn child of an employee*;
- For placement with the employee of a child for adoption or foster care*;
- To care for an immediate family member (spouse, child, or parent) with a serious health condition*;
- To take medical leave when the employee is unable to work because of a serious health condition

*An employee with **no legal or biological relationship** to a child may be entitled to FMLA leave to care for a newborn or placed child, or to care for a child with a serious health condition. To be entitled to FMLA, such an employee must provide **either** day-to-day care **or** financial support, if the employee intends to assume the responsibilities of a parent with regard to a child.

Serious Health Condition

Eligible employees are entitled to FMLA leave due to their own or an immediate family member's serious health condition. "**Serious health condition**" means an illness, injury, impairment, or physical or mental condition that involves either:

- **Inpatient care (i.e., an overnight stay)** in a hospital, hospice, or residential medical-care facility, including any period of incapacity (i.e., inability to work, attend school, or perform other regular daily activities) or subsequent treatment in connection with such inpatient care; or
- **Continuing treatment** by a health care provider, which includes:

- A period of incapacity lasting more than **three (3)** consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition that **also** includes any of the following:
 - Treatment two or more times by or under the supervision of a health care provider (*i.e.*, in-person visits, the first within 7 days and both within 30 days of the first day of incapacity); or
 - One treatment by a health care provider (*i.e.*, an in-person visit within 7 days of the first day of incapacity) with a continuing regimen of treatment (*e.g.*, prescription medication, physical therapy); or
 - Any period of incapacity related to pregnancy or for prenatal care. A visit to the health care provider is not necessary for each absence; or
 - Any period of incapacity or treatment for a chronic serious health condition which continues over an extended period of time, requires periodic visits (at least twice a year) to a health care provider, and may involve occasional episodes of incapacity. A visit to a health care provider is not necessary for each absence; or
 - A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. Only supervision by a health care provider is required, rather than active treatment; or
 - Any absences to receive multiple treatments for restorative surgery or for a condition that would likely result in a period of incapacity of more than three (3) days if not treated.

Military Family Leave Entitlements

The military family leave provisions of the Family and Medical Leave Act (FMLA) entitle eligible employees of covered employers to take two types of FMLA leave:

- Qualifying exigency leave
- Military caregiver leave

Qualifying Exigency Leave

The FMLA entitles eligible employees who work for covered employers to take up to 12 workweeks of unpaid, job-protected leave in a 12-month period for a “qualifying exigency” arising out of the foreign deployment of the employee’s spouse, son, daughter, or parent.

Qualifying exigencies may arise when the employee’s spouse, son, daughter, or parent who is a member of the Armed Forces (including the National Guard and Reserves) and **who is on covered active duty or has been notified of an impending call or order to covered active duty**. For purposes of qualifying exigency leave, an employee’s son or daughter on covered active duty refers to a child of any age.

Covered Active Duty

Eligible employees may take FMLA leave for a qualifying exigency while the military member is on covered active duty, or has been notified of an impending call or order to covered active duty.

- For members of the **Regular Armed Forces**, covered active duty is duty during deployment of the member with the Armed Forces to a foreign country.
- For members of the **Reserve components** of the Armed Forces (members of the National Guard and Reserves), covered active duty is duty during deployment of the member with the Armed Forces to a foreign country under a call or order to active duty in a contingency operation.

- Deployment to a foreign country means deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States. It also includes deployment to international waters.

Types of Qualifying Exigencies

If the military member is on covered active duty, the employee may take FMLA leave for the following qualifying exigencies:

- Issues arising from the military member's **short notice deployment** (i.e., deployment within seven or less days of notice for a period of seven days from the date of notification).
- Attending **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, that are related to the member's deployment.
- Certain **childcare and related activities** arising from the military member's covered active duty, including arranging for alternative childcare, providing childcare on a non-routine, urgent, immediate need basis, enrolling in, or transferring a child to a new school or day care facility.
- Making or updating **financial and legal arrangements** to address a military member's absence while on covered active duty.
- Attending **counseling** for the employee, the military member, or the child of the military member when the need for that counseling arises from the covered active duty of the military member, and is provided by someone other than a health care provider.
- Taking up to 15 calendar days of leave to spend time with a military member who is on short-term, temporary **Rest and Recuperation** leave during deployment.
- Certain **post-deployment activities** within 90 days of the end of the military member's covered active duty, including attending arrival ceremonies, reintegration briefings and events, other official ceremonies or programs sponsored by the military, and addressing issues arising from the death of a military member, including attending the funeral.
- For certain purposes of leave for parental care if the parent of the military member is incapable of self-care.
- Any other event that the employee and employer agree is a qualifying exigency.

Military Caregiver Leave

The Family and Medical Leave Act (FMLA) entitles eligible employees who work for covered employers to take unpaid, job-protected leave to care for a family member who is a current servicemember with a serious injury or illness, or who is a covered veteran with a serious injury or illness. FMLA leave used for these purposes is called military caregiver leave.

Military Caregiver Leave for a Current Servicemember under the FMLA

Military caregiver leave allows an eligible employee who is the spouse, son, daughter, parent, or **next of kin** of a **covered servicemember** with a **serious injury or illness** to take up to a total of 26 workweeks of unpaid leave during a "**single 12-month period**" to provide care for the servicemember.

The "next of kin" of a current servicemember is the nearest blood relative, other than the current servicemember's spouse, parent, son, or daughter, in the following order of priority:

1. A blood relative who has been designated in writing by the servicemember as the next of kin for FMLA purposes
2. A blood relative who has been granted legal custody of the servicemember
3. Brothers and sisters
4. Grandparents
5. Aunts and uncles

6. First cousins

For purposes of military caregiver leave, a **covered servicemember** is a current member of the Armed Forces, including a member of the National Guard or Reserves, who is receiving medical treatment, recuperation, or therapy, or is in outpatient status, or is on the temporary disability retired list for a serious injury or illness.

A **serious injury or illness** is one that is incurred by a servicemember in the line of duty on active duty that may cause the servicemember to be medically unfit to perform the duties of his or her office, grade, rank, or rating. A serious injury or illness also includes injuries or illnesses that existed before the servicemember's active duty, and that were aggravated by service in the line of duty on active duty.

"SINGLE 12-MONTH PERIOD"

The single 12-month period for military caregiver leave begins on the first day the employee takes leave for this reason and ends 12 months later, regardless of the 12-month period established by the employer for other FMLA leave reasons.

An eligible employee is limited to a combined total of 26 workweeks of leave for any FMLA-qualifying reasons during the single 12-month period. Up to 12 of the 26 weeks may be for an FMLA-qualifying reason other than military caregiver leave. For example, if an employee uses 10 weeks of FMLA leave for his or her own serious health condition during the single 12-month period, the employee has up to 16 weeks of FMLA leave left for military caregiver leave.

Military caregiver leave is available to an eligible employee once per servicemember, per serious injury or illness. However, an eligible employee may take an additional 26 weeks of leave in a different 12-month period to care for the same servicemember if he or she has another serious injury or illness. For example, if an eligible employee takes military caregiver leave to care for a current servicemember who sustained severe burns, the employee would be entitled to an additional 26 weeks of caregiver leave in a different 12-month period if the same servicemember is later diagnosed with a traumatic brain injury that was incurred in the same incident as the burns.

An eligible employee may also take military caregiver leave to care for more than one current servicemember or covered veteran with a serious injury or illness at the same time, but the employee is limited to a total of 26 weeks of military caregiver leave in any single 12-month period. Additionally, an eligible employee may be able to take military caregiver leave for the same family member with the same serious injury or illness both when the family member is a current servicemember and when the family member is a veteran.

Military Caregiver Leave for a Veteran under the FMLA

Military caregiver leave allows an eligible employee who is the spouse, son, daughter, parent, or "next of kin" of a covered veteran with a serious injury or illness to take up to a total of 26 workweeks of unpaid leave during a "single 12-month period" to provide care for the veteran.

A veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness is a *covered veteran* if he or she:

- Was a member of the Armed Forces (including a member of the National Guard or Reserves);
- Was discharged or released under conditions other than dishonorable; and
- Was discharged within the five-year period before the eligible employee first takes FMLA military caregiver leave to care for him or her.
 - **Note:** For a veteran who was discharged prior to March 8, 2013, the period between October 28, 2009 and March 8, 2013 will not count toward the determination of the five-year period. For example, if a servicemember retired on October 28, 2007, he or she would have had three years remaining of the five-year period on October 28, 2009. The family member requesting FMLA leave will have three years to begin

military caregiver leave starting on March 8, 2013. Likewise, if a servicemember was discharged on December 1, 2010, the five-year period will begin on March 8, 2013 and extend until March 8, 2018.

A **serious injury or illness** means an injury or illness that was incurred by the covered veteran in the line of duty on active duty in the Armed Forces or that existed before the veteran's active duty and was aggravated by service in the line of duty on active duty, and that is either:

1. A continuation of a serious injury or illness that was incurred or aggravated when the veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or
2. A physical or mental condition for which the veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and the need for military caregiver leave is related to that condition; or
3. A physical or mental condition that substantially impairs the veteran's ability to work because of a disability or disabilities related to military service, or would do so absent treatment; or
4. An injury that is the basis for the veteran's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

Any one of these definitions meets the FMLA's definition of a serious injury or illness for a covered veteran, regardless of whether the injury or illness manifested before or after the individual became a veteran.

"SINGLE 12-MONTH PERIOD"

The single 12-month period for military caregiver leave begins on the first day the employee takes leave for this reason and ends 12 months later, regardless of the 12-month period established by the employer for other FMLA leave reasons.

An eligible employee is limited to a combined total of 26 workweeks of leave for any FMLA-qualifying reasons during the single 12-month period. Up to 12 weeks may be for an FMLA-qualifying reason other than military caregiver leave.

Military caregiver leave is available to an eligible employee once per veteran, per serious injury or illness. However, an eligible employee may take an additional 26 weeks of leave in a different 12-month period to care for the same veteran if the veteran has another serious injury or illness. For example, if an eligible employee takes caregiver leave to care for a veteran who sustained severe burns that rendered him unable to perform his military duties when he was a current servicemember and for which he continues to need care as a veteran, the employee would be entitled to an additional 26 weeks of caregiver leave in a different 12-month period if the veteran is later diagnosed with a traumatic brain injury incurred in the same incident as the burns.

An eligible employee may also take military caregiver leave to care for more than one covered veteran or current servicemember with a serious injury or illness at the same time, but the employee is limited to a total of 26 weeks of military caregiver leave in any single 12-month period. Additionally, an eligible employee may be able to take military caregiver leave for the same family member with the same serious injury or illness both when the family member is a current servicemember and when the family member is a veteran.

Restrictions on Contacting an Employee's Health Care Provider

Contact between an employer and an employee's health care provider must comply with the [Health Insurance Portability and Accountability Act](#) (HIPAA) privacy regulations. Under these regulations, employers may contact an employee's health care provider for authentication or clarification of the medical certification by using a human resource professional, a leave administrator, or a management official. In no case may the employee's direct supervisor contact the employee's health care provider to address employee privacy concerns. The employee will need to provide the HIPAA-covered health care provider with a written authorization allowing the health care provider to disclose individually identifiable health

information to the employer. Employers may not ask the health care provider for additional information beyond that contained on the medical certification form.

Consider FMLA Leave Requests Carefully

When determining if a request for FMLA leave meets the legal requirements, employers should be sure to consult with an experienced HR specialist or attorney knowledgeable in FMLA leave. Questions of whether a certain employee's request for leave at a particular time qualifies under the FMLA can often become technical, fact-sensitive matters. Employers should deny a request for FMLA only after careful consultation and consideration of the situation. In other words, don't go it alone!

Additional Information

- [Family and Medical Leave Act Compliance Assistance from the Department of Labor](#)
- [Fact Sheet on the FMLA](#)
- [Family and Medical Leave Act Regulations, By Subpart](#)
- [Fact Sheet: Military Family Leave Provisions under the FMLA](#)
- [Fact Sheet: Military Caregiver Leave for a Veteran under the FMLA](#)
- [Fact Sheet: Military Caregiver Leave for a Current Servicemember under the FMLA](#)
- [Fact Sheet: Qualifying Exigency Leave under the FMLA](#)
- [The Family and Medical Leave Act Poster](#)
- [The Family and Medical Leave Act Poster — in Spanish](#)
- [The Employee's Guide to the Family and Medical Leave Act](#)