

## FMLA Regulations Effective January 16, 2009 Additional Military Amendments Effective October 28, 2009

Below is a summary of the FMLA regulations effective January 16, 2009, as well as amendments to the regulations governing military-related FMLA leave that were effective with the passage of the National Defense Authorization Act for 2010 on October 28, 2009. Please remember that if an employee qualifies for both a FMLA and WFMLA leave, the employee is entitled to the greater benefit provided under state or federal law. The employee is also eligible for any expanded benefits that may be provided by a collective bargaining agreement, University Personnel Guideline or employer policy. A FMLA/WFMLA summary and comparison document is available on OSER's website: <http://oser.state.wi.us/docview.asp?docid=6897>. The document includes information about which law provides a greater benefit.

**Link to the Dept of Labor's FMLA Final Rule:** <http://edocket.access.gpo.gov/2008/pdf/E8-26577.pdf>

Go to UWSA's document [FMLA/WFLMA Forms – Order of Use](#) to learn what forms need to be used during a W/FMLA leave.

### Clarifications regarding two types of FMLA-qualifying leave related to military service

- Qualifying Exigency Leave
- Military Caregiver Leave (also known as Covered Servicemember Leave)
- Originally signed into law on January 28, 2008 – FMLA final ruling clarifies law. Amended by National Defense Authorization Act on October 28, 2009.
- **NOTE:** There are no military leave provisions under WFMLA so all rules relative to the FMLA must be followed if an employee is granted a military exigency leave or military caregiver leave.

### Military Family Leave – Qualifying Exigency Leave – 29 CFR §825.126

- Effective 10/28/09
- Available to families of service members in the reserve components of the military (e.g. National Guard). Effective October 28, 2009, this provision is also available to families of servicemembers in the regular component of the Armed Forces.
  - The employee must be the spouse, son, daughter or parent of the service member in order to qualify for FMLA-covered qualified exigency leave.
  - This provision makes the normal 12 workweeks of FMLA job-protected leave available to eligible employees who need to take a leave due to “any qualifying exigency” that arises because the employee has an eligible family member:
    1. Who is member of the reserve component of the Armed Forces who is called to active duty or is on active duty status in any foreign country; or
    2. Who is a member of the regular component of the Armed Forces who is deployed to any foreign country.
  - The U.S. Dept. of Labor (DOL) has defined a qualifying exigency by referring to eight broad categories for which employees can use FMLA leave:
    1. Short-notice deployment (7 days notice or less)
    2. Attend military events/ceremonies and related activities related to active duty or call to active duty
      - Includes attending family support programs and informational briefings sponsored by the military or other military service/support organizations
    3. Childcare and school activities
      - Arrange to change childcare arrangement
      - Provide childcare on a short-term or urgent basis
      - Enroll or transfer child in new school
- Effective 10/28/09

- Attend school or daycare related meetings
- 4. Financial and legal arrangements
- 5. Counseling
- 6. Spend time with a military member who is on temporary rest and recuperation leave
  - Limit of five days of leave for each instance of rest and recuperation
- 7. Post-deployment activities
  - Attend arrival ceremonies, reintegration briefings, other official military ceremonies
  - Address issues that arise from the death of the military service member
  - Leave must be taken within 90 days of the termination of active duty status
- 8. Additional activities not encompassed in the other categories, but agreed to by the employer and employee
- Certification of Leave (29 CFR §825.309)
  - The employee should complete the form, [Certification of Qualifying Exigency for Military Family Leave](#) (UWS 84), to certify reason for leave
  - An employer may do any of the following to confirm the exigency
    - Require a copy of the military orders or other official documentation of active duty service
    - Request any available supporting documentation
    - Contact third parties to verify meetings/appointments.

**Military Family Leave – Military Caregiver Leave (also known as Covered Servicemember Leave) – 29 CFR §825.127**

- Available to care for a current member of the Regular Armed Forces, including a member of the National Guard or Reserves, or a member of the Armed Forces, the National Guard or Reserves who is on the temporary disability retired list.
- Effective October 28, 2009, the provision is also available to care for 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 the National Guard and Reserves, at any time during the five-year period preceding the date on which the veteran undergoes medical treatment, recuperation or therapy.
- The employee must be the spouse, son, daughter, parent, or next of kin (nearest blood relative other than the servicemember’s spouse parent, son or daughter) of a covered servicemember.
- Used to care for an eligible servicemember who has a serious injury or illness for which he or she is undergoing medical treatment, recuperation, therapy, on outpatient status or is on the temporary disability retired list.
  - A “serious injury or illness” is defined as that “incurred by a covered servicemember in the line of duty on active duty (or existed before the beginning of the member’s active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating.”
  - In the case of a veteran, this means an “injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member’s active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran.”
- An eligible employee may take up to 26 workweeks of leave in a “single 12-month period” to care for the servicemember.
  - The “single 12-month period” commences on the first day of leave taken to care for the servicemember and expires 12 months from 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.

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- If the employee does not take all of the 26 workweek entitlement during the “single 12-month period,” the remainder of the 26 workweek entitlement is forfeited.
  - The “single 12-month period” is applied on a per-covered-servicemember, per-injury basis so an employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for a different servicemember or the same servicemember with a subsequent illness or injury.
    - **NOTE:** No more than 26 workweeks of leave may be taken within any “single 12-month period”
- An employee is entitled to a combined total of 26 workweeks of leave for any FMLA-qualifying reason during the “single 12-month period.” Within the “single 12-month period,” an employee is limited to a total of 12 weeks of FMLA leave for any purpose other than to care for an injured servicemember. See Appendix A for examples of how to track FMLA leave usage during a “single 12-month period.”
- Leave that can be designated as leave to care for a servicemember shall be counted as such, and not as leave to care for a family member with a serious health condition.
- Certification of Leave (29 CFR §825.310)
  - The employee should complete the form, [\*Certification for Serious Injury or Illness of Covered Servicemember for Military Leave\*](#) (UWS 85), to certify reason for leave.
  - An employer may do any of the following to confirm the reason for the leave
    - Require an employee to obtain a certification from an authorized health care provider of the servicemember. An authorized health care provider is one of the following:
      - US Dept of Defense (DOD) health care provider
      - US Dept of Veterans Affairs (VA) health care provider
      - DOD TRICARE network authorized health care provider
      - A DOD non-network TRICARE authorized private health care provider
    - Require certification of the military status of the servicemember
    - Require certification of the employee’s relationship to the servicemember
  - In lieu of certification, an employer must accept “invitational travel orders” (“ITOs”) or “invitational travel authorizations” (“ITAs”) issued to any family member to join an injured or ill servicemember at his or her bedside.
    - Providing an ITO or ITA is sufficient certification for the specified time for an employee to take leave on a continuous or intermittent basis, regardless of whether the employee is named in the ITO or ITA
    - When certification or an ITA or ITO is provided, employers may not require a 2<sup>nd</sup> or 3<sup>rd</sup> medical opinion, nor may an employer require periodic recertification. However, the employer may seek authentication and/or clarification

## **UPDATES AND CLARIFICATIONS TO NON-MILITARY RELATED FMLA PROVISIONS**

### **Eligibility – Determining 12 months of employment with the same employer – 29 CFR §825.110(b)(1)**

In order to be eligible for FMLA, an employee must work for the state for at least a total of 12 months (need not be consecutive). Employment periods prior to a break in service of seven years or more need not be counted in determining whether the employee has been employed by the state for at least 12 months. Per OSER, it is uncertain yet whether the state will adopt this limitation. It should rarely matter, and would add to the administrative inconsistency with the WFMLA.

### **Clarifying the definition of “Continuing Treatment” – 29 CFR §825.115**

Clarification of the rules regarding an employee with a serious health condition involving continuing treatment and an absence of more than three consecutive full calendar days – the employee is required to visit a health care professional at least two times within 30 days of the first day of incapacity unless there are extenuating circumstances (e.g. the doctor has no available appointments). Under the old regulations there was no limit

how far apart the two visits could be. The first visit to the health care provider must occur within 7 days of the first day of incapacity.

The final rule defines “periodic visits” for chronic serious health conditions as at least two visits to a health care provider per year. This provision was open ended under the old rules. The final rule will potentially subject employees to more stringent requirements by the employer.

#### **Leave for Pregnancy or Birth – 29 CFR §825.120(a)(5)**

The final rule clarifies that FMLA leave to care for a pregnant woman is available to the spouse, but not to a boyfriend or fiancé who is the father of the unborn child. This is in contrast to family leave for and after birth for which a spousal relationship is not required.

#### **Scheduling of intermittent or reduced schedule leave – 29 CFR §825.203**

The final rule clarifies that employees who take intermittent leave have a statutory obligation to make a “reasonable effort” to schedule such leave so as not to disrupt unduly the employer’s operations. (Previously, employees were to “attempt” such scheduling.)

#### **Increments of FMLA leave – 29 CFR §825.205(a)(2)**

An entire work shift may be counted as FMLA leave if it is physically impossible for an employee to join a shift once it has started (e.g. flight attendant, railroad conductor).

#### **Substitution of paid leave – 29 CFR §825.207**

- **General substitution of paid leave requirements**

- In a major regulatory change, an employee wishing to substitute accrued paid leave for a period of FMLA leave is subject to the terms and conditions of the employer’s normal leave policies.
- An eligible employee’s right to unpaid leave is guaranteed - the employee must request and receive approval to use paid leave on the same basis as an employee requesting paid leave where FMLA is not involved.
- In the final rule, all forms of paid leave offered by the employer will be treated the same, regardless of the type of leave substituted. An employee electing to use any type of paid leave concurrently with FMLA leave must follow the same terms and conditions of the employer’s policy that apply to other employees for the use of such leave.
- The final rule defines the word “substitute” as it refers to substituting paid leave
  - It means that the “substituted” paid leave will run concurrently with the unpaid FMLA leave so that the employee receives pay pursuant to the employer’s applicable paid leave policy during the period that would otherwise be unpaid FMLA leave (29 CFR §825.207(a))
- This new provision is in stark contrast to the WFMLA, which provides a super-right of the employee to substitute any type of accrued paid leave at any time. If employee is eligible for WFMLA, employee qualifies for more generous paid leave substitution provisions.

- **Workers’ Compensation**

- Employers and employees may voluntarily agree to supplement workers’ compensation (WC) benefits with accrued paid leave.

- **Use of accrued compensatory time for substituted paid leave**

- The final rule allows substituted comp time to be used as substituted paid time during an FMLA leave. Compensatory time is not counted as WFMLA time, due to a court decision.

**Perfect attendance awards – 29 CFR §825.215 (c)(2)**

The final rule changes the treatment of perfect attendance awards (e.g. bonus, additional pay) to allow employers to deny a “perfect attendance” award to an employee who does not have perfect attendance because of an FMLA leave as long as it treats employees taking non-FMLA leave in an identical way. This rule addresses the unfairness perceived by employees and employers as a result of requiring an employee to obtain a perfect attendance award for a period during which the employee was absent from the workplace on FMLA leave. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used paid vacation leave for an FMLA-protected purpose also must receive the payment.

**Light duty – CFR 29 §825.220(d)**

The final rule deletes the provision that job restoration rights are available until 12 weeks have passed within the applicable 12-month FMLA leave year, which used to include all FMLA leave taken and during a period of light duty. Employees now retain their right to reinstatement for a full 12 weeks of leave, instead of having the right diminished by the amount of time spent in a light duty position. Light duty does not count against the employee’s 12-week FMLA leave entitlement. The employee’s right to restoration ceases at the end of the applicable 12-month FMLA leave year. This modification aligns the FMLA with the WFMLA on this point.

**Notice of FMLA eligibility – 29 CFR §825.300(b)**

When an employee requests FMLA leave or when the employer becomes aware that an employee’s leave may be eligible for FMLA, the employer must notify the employee of the employee’s eligibility to take FMLA leave within five business days, unless there are extenuating circumstances. The [eligibility notice](#) must state whether or not the employee is eligible for FMLA leave. If the employee is not eligible for FMLA leave, the notice must list at least one reason by the employee is not eligible. Notice of eligibility may be oral or in writing.

**Rights and responsibilities notice – 29 CFR §825.300(c)**

The packet of information on employee rights and responsibilities is to be provided to the employee at the same time as the notice of FMLA eligibility. This [notice](#) must include information about the employee’s ability to substitute paid leave during the FMLA leave, as well as the option to take an unpaid FMLA leave.

**Designation notice – 29 CFR §825.300(d)**

When the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason, (e.g., after receiving certification), the employer must notify the employee in writing whether the leave will be designated and will be counted as FMLA leave within five business days, absent extenuating circumstances. Only one [designation notice](#) per FMLA reason per 12-month period is required. Any requirement for a fitness-for-duty examination must be provided with the designation notice, and a list of the essential functions of the employee’s position may be required.

When possible, the designation notice will inform the employee how much FMLA leave will be used. Where the amount of leave is unforeseeable, upon request of the employee the employer must inform the employee how much leave has been used, but not more often than once in a 30-day period in which leave is used. If the notice is oral, a written notice must follow no later than the next payday, unless the payday is less than one week after the oral notice, in which case the notice must be not later than the subsequent payday.

**Employee notice requirements – 29 CFR §825.302**

Employees are to provide [notice](#) of the need for leave as soon as practicable (possible and practical), and to follow the employer’s usual procedures for calling in and requesting leave. This replaces the old regulatory standard that allowed the employee to delay notifying the employer for 2 days. The final rule clarifies, for purposes of the employee’s notice requirement for unforeseeable FMLA leave, calling in “sick” without

providing more information is NOT considered sufficient notice to trigger an employer's obligations under FMLA (29 CFR §825.303(b)).

An employee who seeks leave due to a condition for which the employer has previously taken FMLA leave is to inform the employer that the leave is for a condition that was previously certified or for which the employee has previously taken FMLA leave.

Employee failure to meet notice requirements may result in delay or denial of FMLA coverage for leave.

### **Medical Certifications**

The employer should request that an employee furnish a certification at the time the employee gives notice of the need for leave OR within five business days thereafter OR in the case of unforeseen leave, within five business days after the leave begins. The employee must provide the required certification to the employer within 15 calendar days after the employer's request, unless it is not practicable under the circumstances despite the employee's diligent, good-faith effort or the employer provides more than 15 calendar days to return the certification (29 CFR §825.305(b)).

The employer will advise the employee in writing if a certification is incomplete or insufficient, and normally must allow the employee seven calendar days to correct any deficiency (29 CFR §825.305(c)). If the certification is still insufficient, the employer may contact the health care provider for clarification and authentication. The contact may be made by a health care provider, a human resources professional, a leave administrator, or a management official, but under no circumstances by the direct supervisor of the employee (29 CFR §825.307(a)). The employer may not ask health care providers for additional information beyond that required by the certification form.

In all cases, an employer may request medical recertification as frequently as every 6 months, even where the previous certification stated a medical duration of a longer or indefinite time (29 CFR §825.308(b)).

With a recertification request, the employer may provide the health care provider a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern (29 CFR §825.308(e)).

[Certification for Employee's Own Serious Health Condition](#) (UWS 82)

[Certification for Family Member's Serious Health Condition](#) (UWS 83)

### **Fitness-For-Duty Certifications – 29 CFR §825.312**

The final rule makes two changes to the fitness-for-duty certification process. An employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. In order to require such a certification, an employer must provide an employee with a list of the essential functions of the employee's job no later than with the designation notice required by §825.300(d). If the employee works in a position where reasonable job safety concerns exist, an employer may require a fitness-for-duty certification before an employee returns to work when the employee takes intermittent leave.

### **REMINDER: FMLA and Americans with Disabilities Act (ADA) – 29 CFR §825.702**

The leave provisions of the FMLA are distinct from reasonable accommodation requirements under the ADA. The purpose of FMLA is to make leave available to eligible employees, not to limit existing rights and protection. The employer must provide leave and accommodations under whichever statutory provision provides the greater rights to the employee.

## Appendix A

### Example of how to calculate an employee's military caregiver leave when employer uses a calendar year method for all other FMLA-related leave

The following is taken verbatim from pages 67970 and 67971 of the [Federal Register/Vol. 73, No. 222](#):

“A number of commenters asked that the Department provide examples of how employers should “reconcile” the use of leave to care for a covered servicemember with other FMLA leave if two different leave years are used. The following example explains how an employer would calculate an employee's entitlement to military caregiver leave when it utilizes a calendar year method for other FMLA qualifying reasons:

The employer uses the calendar year method (January 2009–December 2009) for determining an employee's leave balance for FMLA leave taken for all qualifying reasons other than military caregiver leave. An employee first takes military caregiver leave in June 2009. Between June 2009 and June 2010 (the “single 12-month period” for military caregiver leave), the employee can take a combined total of 26 workweeks of leave, including up to 12 weeks for any other qualifying FMLA reason if he has not yet taken any FMLA leave in 2009.

If, however, the employee had already taken five weeks of FMLA leave for his own serious health condition when he began taking military caregiver leave in June 2009, he would then be entitled to no more than seven weeks of FMLA leave for reasons other than to care for a covered servicemember during the remainder of the 2009 calendar year (*i.e.*, the 12 weeks yearly entitlement minus the five weeks already taken). Although his entitlement to FMLA leave for reasons other than military caregiver leave is limited by his prior use of FMLA leave during the calendar year, the employee is still entitled to take up to 26 weeks of FMLA leave to care for a covered servicemember from June–December 2009.

Beginning in January 2010, the employee is entitled to an additional 12 weeks of FMLA leave for reasons other than to care for a covered servicemember. If the employee takes four weeks of FMLA leave for his own serious health condition in January 2010, this would reduce both the number of available weeks of FMLA leave remaining in calendar year 2010 (*i.e.*, the 12 weeks yearly entitlement minus the four weeks already taken) and the number of weeks of FMLA leave available for either military caregiver leave or other FMLA qualifying reasons during the “single 12-month period” of June 2009–June 2010.

Once the employee exhausts his or her 26-workweek entitlement, he or she may not take any additional FMLA leave for any reason until the “single 12-month period” ends. Thus, for example, if the employee took 20 workweeks of military caregiver leave from June–December 2009, four workweeks of leave in January 2010 for his or her own serious health condition, and another two workweeks of military caregiver leave in March 2010, the employee will have exhausted his or her 26-workweek entitlement for the “single 12-month period” of June 2009–June 2010. While the employee would still have eight weeks of FMLA leave available in calendar year 2010, the employee could not take such leave until after June 2010, when the “single 12-month period” ends.”