

Should I Stay or Should I Go? FMLA Leave and Obligations

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Topics of Discussion*

- Employer Coverage and Employee Eligibility
- Qualifying Reasons for Leave
- Amount of Leave
- Employer Rights and Responsibilities
- Employee Rights and Responsibilities
- Military Family Leave Provisions
- State Laws and Accommodation

**presentation slides contain information from Department of Labor website (www.dol.gov)*



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Employer Coverage

- Private sector employers with 50 or more employees
- Public Agencies
- Public and private elementary and secondary schools



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3



Employee Eligibility

- Employed by covered employer
- Worked at least 12 months
- Have at least 1,250 hours of service during the 12 months before leave begins
- Employed at a work site with 50 employees within 75 miles



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4



Qualifying Leave Reasons

- Eligible employees may take FMLA leave:
 - For the birth or placement of a child for adoption or foster care
 - To care for a spouse, son, daughter, or parent with a serious health condition
 - For their own serious health condition
 - Because of a qualifying reason arising out of the covered active duty status of a military member who is the employee's spouse, son, daughter, or parent (**qualifying exigency leave**)
 - To care for a covered servicemember with a serious injury or illness when the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember (**military caregiver leave**)



Qualifying Family Members

- **Parent** - A biological, adoptive, step or foster father or mother, or someone who stood *in loco parentis* to the employee when the employee was a son or daughter. Parent for FMLA purposes does not include in-laws.
- **Spouse** - A husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including common law marriage and same-sex marriage.
- **Son or Daughter** - *For leave other than military family leave*, a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis* who is either under 18 years of age, or 18 or older and incapable of self-care because of a mental or physical disability.



Amount of Leave

- Employee's workweek is basis for entitlement
- Eligible employees may take up to **12 workweeks** of FMLA leave:
 - for the birth or placement of a child for adoption or foster care;
 - to care for a spouse, son, daughter, or parent with a serious health condition; and
 - for the employee's own serious health condition.



Intermittent Leave

- Employee is entitled to take intermittent or reduced schedule leave for:
 - Employee's or qualifying family member's serious health condition when the leave is medically necessary
 - Covered servicemember's serious injury or illness when the leave is medically necessary
 - A qualifying exigency arising out of a military member's covered active duty status
- Leave to bond with a child after the birth or placement must be taken as a continuous block of leave unless the employer agrees to allow intermittent or reduced schedule leave

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Intermittent Leave

- In calculating the amount of leave, employer must use the shortest increment the employer uses to account for other types of leave, provided it is not greater than one hour
- Shortest increment may vary during different times of day or shift
- Required overtime not worked may count against an employee's FMLA entitlement



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9



Substitution of Paid Leave

- “Substitution” means paid leave provided by the employer runs concurrently with unpaid FMLA leave and normal terms and conditions of paid leave policy apply
- Employees may choose, or employers may require, the substitution of accrued paid leave for unpaid FMLA leave
- Employee remains entitled to unpaid FMLA if procedural requirements for employer's paid leave are not met
 - Examples: vacation; PTO; sick leave; workers' compensation leave; disability leave



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10



Employer Responsibilities

- Provide notice
- Maintain group health insurance
- Restore the employee to same or equivalent job and benefits
- Maintain records



Employer Responsibilities – Job Restoration

- Same or equivalent job
 - equivalent pay
 - equivalent benefits
 - equivalent terms and conditions
- Employee has no greater right to reinstatement than had the employee continued to work
- Bonuses predicated on specified goal may be denied if goal not met
- Key employee exception



Employer Responsibilities – Prohibited Employment Actions

- Employers cannot:
 - interfere with, restrain or deny employees' FMLA rights
 - discriminate or retaliate against an employee for having exercised FMLA rights
 - discharge or in any other way discriminate against an employee because of involvement in any proceeding related to FMLA
 - use the taking of FMLA leave as a negative factor in employment actions



Employee Responsibilities

- Provide sufficient and timely notice of the need for leave
- If requested by the employer:
 - Provide certification to support the need for leave
 - Provide periodic status reports
 - Provide fitness-for-duty certification



Employee Responsibilities – Notice Requirements

- Provide sufficient information to make employer aware of need for FMLA-qualifying leave
- Specifically reference the qualifying reason or the need for FMLA leave for subsequent requests for same reason
- Consult with employer regarding scheduling of planned medical treatment

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Employee Responsibilities – Notice Requirements

- Comply with employer's usual and customary procedural requirements for requesting leave absent unusual circumstances
- Foreseeable Leave - 30 days notice, or as soon as practicable
- Unforeseeable Leave - as soon as practicable



Employee Responsibilities – Provide Certification

- Medical Certification for serious health condition (optional WH-380-E and 380-F)
 - Submit within fifteen calendar days
 - Employer must identify any deficiency in writing and provide seven days to cure
 - Annual certification may be required
 - Employee responsible for any cost

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Employee Responsibilities – Provide Certification

- Employer (**not** employee's direct supervisor) may contact health care provider to:
 - **Authenticate:** Verify that the information was completed and/or authorized by the health care provider; no additional information may be requested
 - **Clarify:** Understand handwriting or meaning of a response; no additional information may be requested beyond what is required by the certification form

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Employee Responsibilities – Provide Certification

- Second and third opinions (at employer's cost)
 - If employer questions the validity of the complete certification, the employer may require a second opinion
 - If the first and second opinions differ, employer may require a third opinion that is final and binding

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Employee Responsibilities – Fitness-for-Duty Certification

- For an employee's own serious health condition, employers may require certification that the employee is able to resume work
 - Employer must have a uniformly-applied policy or practice of requiring fitness-for-duty certification for all similarly-situated employees
- If state or local law or collective bargaining agreement is in place, it governs the return to work
- Not permitted for intermittent or reduced schedule leave unless reasonable safety concerns exist
- Authentication and clarification
- Employee responsible for any cost



FMLA Military Family Leave

The FMLA military family leave provisions include:

- **Qualifying exigency leave**, which provides up to **12 workweeks** of FMLA leave to help families manage their affairs when a military member has been deployed to a foreign country; and
 - **Military caregiver leave**, which provides up to **26 workweeks** of FMLA leave to help families care for covered servicemembers with a serious injury or illness
- Generally, FMLA rules and requirements continue to apply



Qualifying Exigency Leave

Eligible employees may take up to **12 workweeks** of FMLA leave because of a qualifying reason that arises out of the fact that the employee's spouse, son, daughter, or parent is on, or has been notified of an impending call, to "covered active duty" to a foreign country

- For qualifying exigency leave, son or daughter refers to a son or daughter of any age
- Leave for this reason counts against an employee's normal FMLA entitlement for other leave reasons within the 12-month leave year



Qualifying Exigencies

- Short-notice deployment (up to seven days)
- Military events and related activities
- Childcare and school activities
- Financial and legal arrangements
- Non-medical counseling
- Care of the military member's parent
- Rest and recuperation (up to fifteen days)
- Post-deployment activities (90-day period)
- Additional activities by agreement



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23



Employee Responsibilities – Provide Certification

- An employer may require an appropriate certification with:
 - a copy of the military member's active duty orders
 - a qualifying exigency certification (optional Form WH-384)
 - Statement of facts
 - Dates of leave
 - Frequency and duration of intermittent leave
 - Contact information for any third party meeting
- The employer may verify meetings with a third party and may contact DOD to verify the military member's covered active duty status



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24



Military Caregiver Leave

Eligible employees may take up to **26 workweeks** of FMLA leave in a “single 12-month period” to care for a “covered servicemember” with a “serious injury or illness” if the employee is the covered servicemember’s (current or veteran discharged within 5 years) spouse, parent, son, daughter, or next of kin (designated or closest blood relative)

- For military caregiver leave, son or daughter refers to a son or daughter of any age
- All FMLA leave is limited to a combined total of 26 workweeks during the “single 12-month period”; no more than 12 workweeks can be taken for other leave reasons



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25



Employee Responsibilities – Certification for a Current Servicemember

- An employer may require that leave to care for a covered servicemember be supported by a certification completed by an authorized health care provider (optional WH-385), or an Invitational Travel Order (ITO) or Invitational Travel Authorization (ITA)
- Authentication and clarification
- Limited second and third opinions



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26



State of Washington Requirements

- Employers of 8 or more employees must provide a woman with leave for the time she is sick or temporarily disabled because of pregnancy or child birth.
- Must treat pregnancy related leave the same as other temporary disabilities, including benefits.
- Washington Family Leave Act provides for up to 12 weeks of unpaid leave for the birth or placement of a child **in addition to the woman's pregnancy disability leave**. The Act adopts the same qualification standards as the FMLA.

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State of Washington Requirements

- An employee who uses all or part of FMLA leave for an exigent reason related to military deployment or for military caregiver leave may still have access to all 12 weeks of FLA leave (including for their own serious health condition, care of an ill family member, or care of a new child).



Reasonable Accommodation for Disabilities (ADA, WLAD)

An employer's duty to reasonably accommodate an employee's disability may require it to grant additional leave beyond that required by the FMLA or state leave laws.



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29



Thank you!



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