



## SELECTED FMLA REGULATIONS COMPARISON

The following chart compares the Family and Medical Leave Act statutory requirements with current regulations and the revised FMLA regulations that are scheduled to take effect on January 16, 2009. The new military family leave provisions are incorporated into the chart in the appropriate sections. In addition, four new regulatory sections addressing specific employee and employer responsibilities for purposes of military family leave are described in the appendix.

Statutory Citation	Current Regulation	Issue(s)	Final Regulation
<p><b>29 U.S.C. §2611(2)</b> <b>Eligible employee</b></p> <p>An individual must be employed for at least 12 months and for at least 1,250 hours of service within the previous 12-month period.</p>	<p><b>29 C.F.R. §825.110<sup>1</sup></b> <b>Eligibility</b></p> <p>If an employee is maintained on the payroll for any part of a week, including periods of paid or unpaid leave, the week counts as a week of employment.</p>	<p>12 months does not need to be consecutive and may be based on separate stints of employment; employees may become eligible when they are on leave.</p>	<p>Separate stints of employment will be counted, provided that a break-in-service does not exceed 7 years. Separate stints of employment will be counted for breaks-in-service of 7 years or longer if one of the following applies: 1) break-in-service due to National Guard or Reserve military service obligation; or 2) written agreement (includes CBA) reflecting an employer's intention to rehire the employee after the break-in-service.</p>

<sup>1</sup> All regulatory references hereafter are to 29 C.F.R.

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<p><b>29 U.S.C. §2611(11) Serious Health Condition (SHC)</b></p> <p>An illness, injury, impairment or physical or mental condition that involves inpatient care in a hospital, hospice or residential medical care facility or continuing treatment by a health care provider.</p>	<p><b>825.114 Serious Health Condition</b></p> <p>Six separate definitions: inpatient care; incapacity in excess of three consecutive calendar days plus treatment; pregnancy; chronic conditions; multiple treatments; and long-term conditions.</p>	<p>Unplanned intermittent leave for chronic SHCs, and acute, non-serious conditions frequently satisfy the definition of a SHC because they involve incapacity in excess of three days.</p>	<p>Section renumbered as 825.113 but definition of SHC unchanged.</p> <p>New language regarding what constitutes “continuing treatment” for a period of incapacity or a chronic condition, which appears in a separate section (825.115). Treatment two or more times by a health care provider must take place within a 30-day period. For chronic conditions requiring periodic visits for treatment, such visits must take place at least twice a year.</p> <p>Carves out definition of “in-patient care,” now appearing in 825.114.</p>

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<p><b>29 U.S.C §2612(1)(C) Caring for a covered family member</b></p> <p>Leave may be granted in order to care for the spouse, or a son, daughter, or parent with a SHC.</p> <p><b>29 U.S.C. § 2613(b)</b></p> <p>Certification to include a statement that the eligible employee is needed to care for the family member and an estimate of the amount of time that is needed.</p>	<p><b>825.116 “Needed to care”</b></p> <p>Includes both physical and psychological care, and need for transportation to the doctor. Also includes psychological comfort beneficial to a family member who is receiving inpatient or home care.</p>	<p>The scope of “caring for” a family member is broad and not well defined.</p>	<p>Section renumbered as 825.124. Leaves definition of “needed to care” unchanged, U.S. Department of Labor (DOL) states that legislative history supports current construction. Adds following clarification to existing language: employee need not be only individual available to care for qualified family member or covered servicemember.</p>

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<p><b>29 U.S.C. §2612(b)(1) Reduced /Intermittent Leave</b></p> <p>Taking of leave intermittently or on a reduced leave schedule shall not result in a reduction of the total amount of leave to which the employee is entitled beyond the amount of leave actually taken.</p>	<p><b>825.203(d) Taking FMLA leave in parts</b></p> <p>There is no limit on the size of an increment of leave when an employee takes intermittent or reduced schedule leave. An employer may limit leave increments to the shortest period of time that an employer’s payroll system uses to account for absences or use of leave, provided it is one hour or less.</p>	<p>Leave may be taken in very small increments and can be difficult to track administratively.</p>	<p>This provision now appears in 825.205(a) and is unchanged except for clarification that the employer must account for intermittent leave “using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided that it is not greater than one hour. Also recognizes policies which account for use of leave in different increments at different points in time (i.e. one hour increment during 1<sup>st</sup> hour of shift (to discourage chronic tardiness))</p> <p>4) includes a limited exception where it is physically impossible for an employee using intermittent leave to commence or end work mid-way through a shift such as a flight attendant or railway conductor and forced to be absent the entire shift. In those cases, the entire period is designated as FMLA leave.</p>

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<p><b>29 U.S.C. §2612(d) Relationship to paid leave</b></p> <p>If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave may be provided without compensation.</p>	<p><b>825.207(h) Is FMLA leave paid or unpaid?</b></p> <p>When an employee substitutes paid leave and the employer’s procedural requirements are less stringent than the FMLA requirements, only the less stringent requirements can be imposed.</p>	<p>Applying the different procedural requirements creates confusion with compliance for employers.</p>	<p>This section has been deleted.</p>
<p><b>29 U.S.C. §2614(a) Restoration</b></p> <p>An employee taking FMLA leave shall be restored to the same or an equivalent position with equivalent employment benefits, pay and other terms and conditions.</p> <p>The taking of leave shall not result in the loss of any employment benefit that accrued prior to the date that the employee’s leave commenced.</p>	<p><b>825.215 (c)(1), (c)(2) Equivalent Position, Bonuses</b></p> <p>An employee is entitled to unconditional pay increases, but pay increases conditioned upon seniority, length of service, or work performed would not have to be granted unless the employer grants to other employees on “leave without pay.” In such case, the increase would be granted based on seniority, length of service, work performed, etc., excluding the period of unpaid FMLA leave.</p>	<p>Regulation creates confusion over how raises in salary and bonuses are to be given to those who take FMLA leave.</p>	<p>No changes were made to the section on equivalent position.</p> <p>Revises section on bonuses to allow an employer to disqualify an employee from any bonus or award predicated on achievement of a goal that the employee fails to achieve due to his or her FMLA absences (e.g., number of products sold, perfect attendance). Disqualification must apply to all forms of leave.</p>

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<p><b>29 U.S.C. §2615(a) Prohibited Acts</b></p> <p>It is unlawful to interfere with, restrain, or deny the exercise of or the attempt to exercise any right under this subchapter.</p>	<p><b>825.220(d) Protection of Rights</b></p> <p>Employees cannot waive nor may employers induce employees to waive their rights under FMLA.</p>	<p>Recently, some courts have held an employee may not waive FMLA rights, even retroactively, as part of a severance package, without first getting approval from DOL or a court of law.</p>	<p>In response to recent court rulings, this section now expressly provides that employees may settle past FMLA claims without the approval of the DOL or a court.</p>
<p><b>29 U.S.C. §2619 Employer Notice</b></p> <p>Each employer shall post a notice approved by the U.S. Department of Labor.</p>	<p><b>825.301(c) Employer Notice requirements</b></p> <p>Employers must include written guidance in any handbook or policy manual and shall also provide the employee with written notice detailing the specific expectations and obligations within one or two business days after notice of the need for leave is given by the employee.</p>	<p>Short time frame provided for employer to comply with notice requirements.</p>	<p>Requirements of this section moved to a comprehensive section addressing employer notice obligations, 825.300. According to subsection (b)(1), employers now have 5 business days, if feasible, in order to provide employees with written notice.</p>

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<p><b>29 U.S.C. §2612(e) Foreseeable leave – notice by employee</b></p> <p>Not less than 30 days notice or as much notice as is practicable under the circumstances.</p> <p>An employee is to make reasonable effort to schedule treatment so as not to be unduly disruptive to the employer’s business operations.</p>	<p><b>825.302 Employee notice</b></p> <p>An employer may require an employee to comply with usual and customary notice and procedural requirements, but failure to follow will not permit an employer to deny or delay leave if the employee gives timely verbal or other notice.</p> <p>An employer may not require compliance with stricter FMLA notice requirements where a collective bargaining agreement, stated law or applicable leave plan allow less advance notice. If an employer has less stringent notice requirements for taking vacation, those requirements (and not the FMLA requirements) would apply to use of vacation to substitute for FMLA leave.</p>	<p>Creates confusion for employers.</p>	<p>Requires at least 30 days advance notice for foreseeable leave including planned medical treatment for a serious injury or illness of a covered servicemember unless not practicable.</p> <p>Adds an additional requirement to subsection (a), in the event that the employee does not provide 30 days notice, the employer may ask the employee to explain reasons why providing such notice was not practicable.</p> <p>Adds language that when foreseeable leave is due to a qualifying exigency, notice must be provided as soon as practicable regardless of how far in advance leave was foreseeable.</p> <p>Eliminates language in subsection (b), which defined “as soon as practicable” as being “within one to two business days,” and replaces it with examples.</p>

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			<p>Adds language to subsection (c) regarding content of notice to specifically include notice for exigency and military caregiver leave and states that an employee must provide sufficient information to indicate need for FMLA leave and anticipated timing and duration of leave but need not mention FMLA by name.</p> <p>Employee must respond to an employer's questions in order to determine if the absence is FMLA-qualifying. Failure to respond to such inquiries may result in denial of FMLA protection if the employer is unable to determine that leave is FMLA qualifying.</p> <p>Revises subsection (d) to delete sentence that an employer may not disallow or deny an employee's FMLA leave if the employee fails to follow the employer's usual notice and procedural requirements for requesting leave and calling in absences.</p> <p>New language provides that if an</p>

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			<p>employee fails to comply with the employer's usual notice and procedures, absent unusual circumstances, the employer is permitted to delay or deny FMLA-protected leave. Unusual circumstances include situations where there is no one to answer the designated call-in number and an employee is unable to leave a voicemail because the box is full.</p> <p>Section adds requirement that employees provide sufficient information if leave is due to a qualifying exigency, call to active duty, or if leave is to care for a covered servicemember.</p> <p>Revises subsection (g) to eliminate language regarding impact of CBA, state law or applicable leave plan on FMLA notice requirements.</p>

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<p><b>29 U.S.C. §2613 Certification</b></p> <p>An employer may require certification of a SHC and may request second and third opinions to substantiate that employee or family member has a SHC.</p>	<p><b>825.307 Questioning the Medical Certification</b></p> <p>A health care provider (HCP) representing an employer may, with the employee’s permission, contact the employee’s health care provider for clarification and authentication of the certification. However, if the certification is complete, that is, there is no need for clarification or verification of authenticity, the employer may not request additional information from the health care provider.</p>	<p>Regulation places constraints on the exchange of information between an employee’s HCP and the employer, which can delay the medical certification process.</p>	<p>Revises subsection (a) to eliminate the prohibition against an employer directly contacting an employee’s HCP. The employer is now permitted to directly contact an employee’s HCP for verification (does not involve obtaining additional medical information) or clarification (clarify handwriting or to understand meaning of a response) purposes. The employer may contact the HCP using a health care professional, HR professional, leave administrator, or a management official, but must not use the employee’s direct supervisor.</p> <p>Before an employer may contact an employee’s HCP, the employee must be given a chance to cure any deficiencies in the medical certification. However, an employee’s permission is not needed to contact a HCP for verification of information. The final rule clarifies that an employer must obtain the employee’s</p>

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			<p>permission for clarification of individually-identifiable health information, consistent with HIPAA.</p> <p>In the event that an employee refuses to cure deficiencies in a certification or does not grant the employer permission to speak to the HCP to obtain clarification, the employee’s request for FMLA leave may be denied.</p> <p>Revises provisions regarding second and third opinions to allow an employer to deny FMLA leave to an employee who refuses to release relevant medical records to the HCP designated to provide a second/third opinion, if records are requested by the HCP “in order to render a sufficient and complete” opinion.</p> <p>Now gives an employer 5 business days (instead of 2) to provide the employee with a copy of second/third opinion.</p> <p>The final rule clarifies that this section does not apply to the military leave provisions.</p>

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<p><b>29 U.S.C. §2613(e) Subsequent recertifications</b></p> <p>An employer may require subsequent recertifications from an employee on a reasonable basis.</p>	<p><b>825.308 Recertifications</b></p> <p>Recertifications are allowed for pregnancy, chronic, or permanent/long-term conditions, no more often than every 30 days and only in connection with an absence unless (i) circumstances have changed significantly; or (ii) the employer receives information casting doubt on reason given for absence.</p> <p>If the minimum duration is more than 30 days, no recertification may be requested until the duration has passed unless one of the two conditions above apply or (iii) the employee requests an extension of the leave.</p> <p>No second or third opinion on recertification may be required.</p>	<p>Statute does not indicate whether second/third opinion procedures apply to recertifications. Rules regarding recertifications are unduly complicated.</p>	<p>Amends section to provide that, in all cases, an employer may request recertification every 6 months in connection with an absence.</p> <p>Amends section to state the additional circumstances under which an employer can seek recertification in less than 30 days — when an employee seeks an extension of his or her leave.</p> <p>Adds a new subsection stating that an employer may request the same information on recertification as is permitted during initial certification. An employee has the same obligation to cooperate with the employer during the recertification process as in the initial certification process.</p> <p>An employer may provide the HCP with the employee’s attendance records and ask whether need for leave is “consistent” with the employee’s SHC.</p>

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			The final rule clarifies that this section does not apply to the military leave provisions.
<p><b>29 U.S.C. 2614(a)(4) Certification</b></p> <p>An employer may have a uniformly-applied policy requiring certification that an employee is fit to resume work, except nothing in this paragraph shall supersede a valid State or local law or collective bargaining agreement that governs the return to work of such employees.</p>	<p><b>825.310 Fitness for Duty (FFD) Certification</b></p> <p>Any physical required in order to return to work must be job-related and consistent with business necessity and may only be sought with regard to the particular condition that caused the need for FMLA leave. An employer’s health care provider may, with permission of the employee, contact the employee’s provider to clarify fitness for duty, but no additional information may be acquired. Return to work may not be delayed pending contact.</p> <p>An employer may not request a fitness for duty certification when an employee takes intermittent leave.</p>	<p>The restrictions imposed on FFD certifications leave room for potential problems in conjunction with the use of intermittent leave because an employer must rely on the employee’s “self certification” once initial certification is provided.</p>	<p>Renumbered as 825.312. Adds language in subsection (a) stating that an employee has the same obligation to participate and cooperate in FFD process as in the initial certification process, whether that be by providing “complete and sufficient certification or providing sufficient authorization” to the HCP to provide information directly to the employer.</p> <p>New requirement that an employer notify employees in its designation notice whether a FFD certification will be required in order to return to work and indicate whether it must address ability to perform essential job functions. If this notice is provided and an employee later fails to provide certification, the employee loses his/her rights to reinstatement under the law unless the</p>

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			<p>employee has requested additional FMLA leave.</p> <p>Renumbers subsection (f) and retains prohibition on requesting FFD certification after each intermittent leave absence remains, but adds language allowing an employer to require FFD certification every 30 days if the employee has used intermittent leave during that period <u>and</u> “reasonable safety concerns exist regarding the employee’s ability to perform his or her duties.”</p> <p>An employer may not terminate the employee while awaiting such FFD certification.</p>

## Appendix

### **Military Leave Provisions of Family and Medical Leave Act**

On January 28, 2008, President Bush signed into law the National Defense Authorization Act (P.L. 110-181) which included the first expansion of the Family and Medical Leave Act (FMLA). The NDAA expands FMLA-qualified events to include employees caring for an injured service member as well as for family members who have a close family member called to active duty. The Department of Labor (DOL) has incorporated the new military family leave entitlements into the regulatory provisions that concern the taking of FMLA leave for other qualifying reasons. The Department also has created four new regulatory sections—listed below—which address specific employee and employer responsibilities for purposes of military family leave.

#### **825.126 Leave because of a qualifying exigency.**

This section described the new qualifying reason for taking FMLA leave. Allows leave for a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty or has been notified of an impending call or order to active duty in the Armed Forces in support of a contingency operation. Provides a specific and exclusive list of reasons for which an employee can take leave because of a qualifying exigency in section 825.126(a) organized in 7 categories: 1) short-notice deployment, 2) military events and activities, 3) childcare and school activities, 4) financial and legal arrangements, 5) counseling, 6) rest and recuperation, 7) post-deployment activities, and 8) additional activities which arise out of active duty, provided that the employer and employee agree, including agreement on timing and duration of such leave.

#### **825.127 Leave to care for a covered servicemember with a serious injury or illness—military caregiver leave.**

This section allows an eligible employee who is the spouse, son, daughter, parent, or next of kin of a “covered servicemember” to take 26 workweeks of leave during a 12-month period to care for the servicemember.

#### **825.309 Certification for leave taken because of a qualifying exigency.**

Under this section, an employer may require employee to provide a copy of the covered military member's active duty orders the first time the employee requests exigency leave. This information need only be provided to the employer once for each separate call to active duty. An employer may require that a qualifying exigency be supported by a certification from the employee providing:

- a) a description, signed by employee, describing facts supporting leave request and including any available documentation such as copy of meeting announcement, appointment, of copy of bill for service;
- b) the approximate date qualifying exigency commenced or will commence;
- c) if request for a single period of time, the beginning and end dates for the absence;
- d) if request for intermittent or reduced schedule basis, an estimate of the frequency and duration of exigency;
- e) if exigency involves meeting with a third party or entity, contact information for the third party or entity and a brief description of the purpose of the meeting.

DOL developed an optional form (Form WH-384) for this purpose. Once a complete and sufficient certification is received, an employer may not request additional information except the employer may, without permission from employee contact third party to verify meeting and purpose of meeting and contact DOD to request verification of active duty status.

#### **825.310 Certification for leave taken to care for a covered servicemember (military caregiver leave).**

This section allows an employer to require employee to obtain a certification from an authorized HCP of the covered servicemember. DOL developed an optional form (WH-385) for this purpose. An employer may seek authentication and/or clarification of the certification under 825.307, however, second and third opinions under subsection 307 and re-certifications under subsection 308 are not permitted for leave to care for a covered servicemember.

An “invitational travel order” (ITO) or “invitational travel authorization” (ITA) must be accepted as sufficient certification for the duration of time specified in the ITO or ITA. An employer may require confirmation of the covered family relationship with the servicemember. If the employee fails to provide complete and sufficient certification, FMLA leave may be denied.