



FMLA NPRM FAQs

Q - Why is the Department of Labor proposing to revise the FMLA regulations?

A - The Department is proposing changes to the current regulations to implement and interpret new statutory amendments to the FMLA.

On October 28, 2009, the President signed into law the National Defense Authorization Act for Fiscal Year 2010 (FY 2010 NDAA). The FY 2010 NDAA amended the FMLA to extend the military caregiver leave entitlement to eligible family members of certain veterans and to extend the qualifying exigency leave entitlement to eligible family members of the Regular Armed Forces.

The FMLA was also amended by the Airline Flight Crew Technical Corrections Act (AFCTCA) on December 21, 2009. The AFCTCA established a special FMLA hours of service eligibility requirement for airline flight crew members, such as airline pilots and flight attendants.

MILITARY FAMILY LEAVE

Q – What are the FMLA military family leave entitlements?

A – The FMLA military leave provisions entitle eligible employees with covered family members serving in the military to take two special types of leave – military caregiver leave and qualifying exigency leave. Military caregiver leave allows eligible employees an expanded period of FMLA leave – up to twenty-six workweeks in a single 12-month period – to care for a covered family member who is a current servicemember with a serious injury or illness incurred in the line of duty. Qualifying exigency leave allows an eligible employee whose spouse, child, or parent is called up for active duty in the National Guard or Reserves to take FMLA leave for certain exigencies related to the call-up of their family member. Additional information on the military family leave entitlements can be found in Fact Sheet 28A: The Family and Medical Leave Act Military Leave Entitlements at www.dol.gov/whd/fmla.

Q -- How did the FY 2010 NDAA change the military leave entitlements?

A -- The FY 2010 NDAA amended the FMLA's military family leave provisions to expand the availability of military caregiver leave and qualifying exigency leave. The FY 2010 NDAA extended military caregiver leave to eligible employees whose family members are recent veterans with serious injuries or illnesses, including conditions that do not arise until after the veteran has left the military. The FY 2010 NDAA also expanded the definition of a serious injury or illness for both current servicemembers and veterans to include serious injuries or

illnesses that result from a condition that existed before the servicemember's active duty service and was aggravated by service in the line of duty.

In addition, the FY 2010 NDAA expanded qualifying exigency leave to eligible employees with family members serving in the Regular Armed Forces, in addition to the National Guard and Reserves. The FY 2010 NDAA also added the requirement that the military member (National Guard, Reserves, Regular Armed Forces) must be deployed to a foreign country in order for eligible family members to take leave for a qualifying exigency.

Military Caregiver Leave

Q - Does the proposed rule expand military caregiver leave?

A – Yes. The proposed regulations expand military caregiver leave to cover eligible employees whose family members are recent veterans with a serious injury or illness. Before the FY 2010 NDAA, only eligible employees who were the spouse, parent, child, or next of kin of a current servicemember with a serious injury or illness were entitled to the special twenty-six week FMLA leave entitlement to provide care to their family members. Under the new amendments, eligible employees whose covered family member is a recent veteran with a serious injury or illness incurred in the line of duty are also able to take military caregiver leave to care for their family member.

Q - Does the proposed rule allow eligible family members to take FMLA military caregiver leave for all veterans with a serious injury or illness?

A – No. The FY 2010 NDAA amendments limit FMLA military caregiver leave for veterans to veterans who were active members of the military (including National Guard and Reserves) within the past five years. The proposed rule permits an eligible employee to take FMLA leave to care for a veteran who was discharged within the five year period prior to the date the employee first takes military caregiver leave. Under the proposed rule, eligible employees may begin taking military caregiver leave up to five years after their family member was discharged from the military and may continue to take such leave throughout the single 12-month period, even if their leave extends beyond the five year date. Because the five year limitation is statutory, any change to this time frame would require Congress to further amend the FMLA.

Eligible employees may take regular FMLA leave to care for a veteran who is their spouse, parent, son or daughter (if under 18 or disabled) with a serious health condition regardless of when the veteran separated from the military. Additional information on using FMLA leave to care for a family member with a serious health condition can be found in Fact Sheet 28: The Family and Medical Leave Act of 1993 at www.dol.gov/whd/fmla.

Q - If a veteran is enrolled in the VA Program of Comprehensive Assistance for Caregivers, can a family member also take FMLA military caregiver leave?

A – The Department believes that most veterans who are enrolled in the VA’s Program of Comprehensive Assistance for Family Caregivers would also qualify as having a serious injury or illness enabling any family members who are eligible for FMLA leave to take military caregiver leave under the proposed regulations. The Department is aware of the differing administrative requirements that veterans’ families may face in accessing benefits under various programs. The Department seeks to minimize any additional requirements for the family members of veterans in the VA’s Program of Comprehensive Assistance for Family Caregivers to take FMLA military caregiver leave..

Q – Can medical documentation from the VA Program of Comprehensive Assistance for Caregivers be used in the FMLA medical certification process for military caregiver leave for a covered veteran?

A – Yes. Employees may submit documentation from the VA Program of Comprehensive Assistance for Caregivers in the FMLA certification process to establish that their family member is a veteran with a serious injury or illness. If information in the medical documentation submitted is not sufficient to satisfy the FMLA certification requirements, the employer may request the additional information necessary to complete the certification.

Q – Are there other changes to the regulations on military caregiver leave?

A – Yes. The proposed regulations also expand the definition of serious injury or illness for both current servicemembers and veterans to include preexisting conditions that are aggravated in the line of duty. The proposed regulations also expand the health care providers who can provide a medical certification to support FMLA military caregiver leave to include health care providers who are not affiliated with the military.

Qualifying Exigency

Q - Does the proposed rule expand qualifying exigency leave?

A – Yes. Under the proposed regulation, eligible employees with a spouse, child or parent in the Regular Armed Forces can take FMLA leave to deal with exigencies related to their loved one’s deployment to a foreign country. Eligible employees with family members in all military components (National Guard, Reserves, Regular Armed Forces) will be able to take FMLA leave when they need time to address exigencies related to their family member’s call-up or deployment. FMLA leave may be used to deal with financial, legal, or child care issues related to the family member’s call-up or deployment, as well as to attend certain military events, to spend time with the family member during rest and recuperation leave, and for other exigencies. This type of leave was previously only available to eligible employees with family members called up in the National Guard and Reserves. Additional information on qualifying exigency leave can be found in Fact Sheet 28A: The Family and Medical Leave Act Military Leave Entitlements at www.dol.gov/whd/fmla.

Q – Are there other changes to the regulations on qualifying exigencies?

A – Yes. The Department is proposing to expand the amount of FMLA leave an eligible employee may take to spend time with their covered family member during rest and recuperation leave to up to 15 days. Currently such leave is limited to five days.

AFCTCA

Q - How did the AFCTCA change the FMLA?

A – The AFCTCA established a special hours of service eligibility requirement for airline flight crew employees based on the unique scheduling requirements of the airline industry. An airline flight crew employee will meet the FMLA hours of service eligibility requirement if he or she has worked or been paid for not less than 60 percent of the applicable total monthly guarantee (or its equivalent) and has worked or been paid for not less than 504 hours (not including personal commute time or time spent on vacation, medical, or sick leave) during the previous 12 months. Airline employees who are not flight crew members continue to be covered under the general hours of service eligibility requirement which requires 1250 hours of service in the previous 12 months.

Airline flight crew employees continue to be subject to the FMLA's other eligibility requirements.

Q – Are there other changes to the regulations related to AFCTCA?

A – Yes. The Department is proposing specific provisions for calculating the amount of FMLA leave used by airline flight crew employees.

MISC.

Q – Are the proposed regulations expanding the military family leave entitlements in effect now?

A – No. The regulatory changes will not take effect until the Department issues a final rule. Although the proposed regulations are not yet in effect, most of the provisions of the FY 2010 NDAA amendments to the FMLA took effect on October 28, 2009, the date the law was signed. Under these statutory provisions, eligible employees are already entitled to take FMLA leave for qualifying exigencies related to their spouse, parent, or child's deployment to a foreign country with the Regular Armed Forces. The foreign deployment requirement is also in effect for eligible employees taking qualifying exigency leave due to the call-up of their family member in the National Guard or Reserves. Additionally, eligible employees are entitled to take military caregiver leave to care for a current servicemember whose serious injury or illness is caused by the aggravation in the line of duty of a preexisting condition. The only statutory provision that is not yet in effect is the extension of military caregiver leave to family members of veterans with serious injuries or illnesses. This portion of the FY 2010 NDAA requires the Department to define what injuries or illnesses qualify as a "serious injury or illness" for a veteran and therefore will not be in effect until the Department issues a final rule. In the meantime, eligible employees can take up to 12 weeks of FMLA leave to care for a veteran with a serious health condition who is their spouse, parent, son or daughter (if under 18 or disabled). Employers may

also provide employees with leave to care for an injured or ill veteran beyond the leave required by FMLA; such leave, however, would not be FMLA-protected and could not be counted against the employee's FMLA entitlement.

Q – Are the proposed regulations changing the hours of service requirement for airline flight crew employees in effect now?

A – No. The regulatory changes will not be in effect until the Department issues a final rule. Although the proposed regulations are not yet in effect, the statutory provisions of the AFCTCA took effect on the day it was signed, December 21, 2009. Under the statutory provisions, airline flight crew employees who have worked or been paid for not less than 60 percent of the applicable total monthly guarantee and worked or been paid for not less than 504 hours (not including personal commute time or time spent on vacation, medical, or sick leave) during the previous 12 months satisfy the hours of service eligibility requirement for FMLA.

Q - Why is the Department proposing to remove the optional-use forms and notices from the FMLA regulations?

A - The Department believes that removing forms and notices from the regulations will accelerate the clearance process when the forms need to be amended in response to statutory changes and suggestions from the public. This will ensure that the most accurate and up-to-date forms are available. The forms will continue to be available on the WHD Web site (www.dol.gov/whd).

Q – Do the proposed regulations contain changes in addition to the military leave provisions and the airline flight crew provisions?

A – Yes. The Department proposes to delete a provision that was added to the regulations in 2009 which allows employers to utilize different increments of FMLA leave at different times of day under certain circumstances. The Department's enforcement experience indicates some confusion over the application of this provision. In response to the apparent confusion, the Department proposes to delete this provision of the regulations in favor of the more general principle of calculating FMLA leave usage using the employer's shortest increment of leave at any time.

The Department also proposes to clarify the employer's responsibility to reinstate an employee after FMLA leave. The 2009 regulations added a new provision that permits an employer to delay reinstatement where it is physically impossible for the employee to return to his or her job in mid-shift (for example, if the employee works in a locked clean room). The Department is concerned that some employers may have misinterpreted the concept of physical impossibility to apply to circumstances where it is merely inconvenient to reinstate the employee mid-shift. The Department proposes to clarify the narrow scope of this regulatory provision