

**Federal Family & Medical Leave Act
Excerpts – Rules & Regulations (11-17-2008)**

§ 825.122 Definitions of spouse, parent, son or daughter, next of kin of a covered service member, adoption, foster care, son or daughter on active duty or call to active duty status, son or daughter of a covered service member, and parent of a covered service member.

a) *Spouse*. Spouse means 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 in States where it is recognized.

b) *Parent*. Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined in paragraph (c) of this section. This term does not include parents “in law.”

c) *Son or daughter*. For purposes of FMLA leave taken for birth or adoption, or to care for a family member with a serious health condition, son or daughter means 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 age 18, or age 18 or older and “incapable of self-care because of a mental or physical disability” at the time that FMLA leave is to commence.

1) “Incapable of self-care” means that the individual requires active assistance or supervision to provide daily self-care in three or more of the “activities of daily living” (ADLs) or “instrumental activities of daily living” (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one’s grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, *etc.*

2) “Physical or mental disability” means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR 1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, define these terms.

3) Persons who are “in loco parentis” include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

d) *Next of kin of a covered service member*. “Next of kin of a covered service member” means the nearest blood relative other than the covered service member’s spouse, parent, son, or daughter, in the following order of priority: Blood relatives who have been granted legal custody of the covered service member by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered service member has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered service member, all such family members shall be considered the covered service member’s next of kin and may take FMLA leave to provide care to the covered service member, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered service member’s only next of kin. See § 825.127(b)(3).

**Federal Family & Medical Leave Act
Excerpts – Rules & Regulations (11-17-2008)**

e) *Adoption.* "Adoption" means legally and permanently assuming the responsibility of raising a child as one's own. The source of an adopted child (*e.g.*, whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for FMLA leave. See § 825.121 for rules governing leave for adoption.

f) *Foster care.* Foster care is 24-hour care for children in substitution for, and away from, their parents or guardian. Such placement is made by or with the agreement of the State as a result of a voluntary agreement between the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves agreement between the State and foster family that the foster family will take care of the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody. See § 825.121 for rules governing leave for foster care.

g) *Son or daughter on active duty or call to active duty status.* "Son or daughter on active duty or call to active duty status" means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on active duty or call to active duty status, and who is of any age. See § 825.126(b)(1).

h) *Son or daughter of a covered service member.* "Son or daughter of a covered service member" means the service member's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the service member stood in loco parentis, and who is of any age. See § 825.127(b)(1).

i) *Parent of a covered service member.* "Parent of a covered service member" means a covered service member's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered service member. This term does not include parents "in law." See § 825.127(b)(2).

j) *Documenting relationships.* For purposes of confirmation of family relationship, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, *etc.* The employer is entitled to examine documentation such as a birth certificate, *etc.*, but the employee is entitled to the return of the official document submitted for this purpose.

§ 825.124 Needed to care for a family member or covered service member.

a) The medical certification provision that an employee is "needed to care for" a family member or covered service member encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

b) The term also includes situations where the employee may be needed to substitute for others who normally care for the family member or covered service member, or to make arrangements for changes in care, such as transfer to a nursing home. The employee need not be the only individual or family member available to care for the family member or covered service member.

**Federal Family & Medical Leave Act
Excerpts – Rules & Regulations (11-17-2008)**

c) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member or covered service member includes not only a situation where the condition of the family member or covered service member itself is intermittent, but also where the employee is only needed intermittently—such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party. See §§ 825.202 through 825.205 for rules governing the use of intermittent or reduced schedule leave.

§ 825.126 Leave because of a qualifying exigency.

a) Eligible employees may take FMLA leave while the employee's spouse, son, daughter, or parent (the "covered military member") is on active duty or call to active duty status as defined in § 825.126(b)(2) for one or more of the following qualifying exigencies:

1) *Short-notice deployment.*

- i) To address any issue that arises from the fact that a covered military member is notified of an impending call or order to active duty in support of a contingency operation seven or less calendar days prior to the date of deployment;
- ii) Leave taken for this purpose can be used for a period of seven calendar days beginning on the date a covered military member is notified of an impending call or order to active duty in support of a contingency operation;

2) *Military events and related activities.*

- i) To attend any official ceremony, program, or event sponsored by the military that is related to the active duty or call to active duty status of a covered military member; and
- ii) To attend 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 active duty or call to active duty status of a covered military member;

3) *Childcare and school activities.*

- i) To arrange for alternative childcare when the active duty or call to active duty status of a covered military member necessitates a change in the existing childcare arrangement for a biological, adopted, or foster child, a stepchild, or a legal ward of a covered military member, or a child for whom a covered military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence;
- ii) To provide childcare on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the need to provide such care arises from the active duty or call to active duty status of a covered military member for a biological, adopted, or foster child, a stepchild, or a legal ward of a covered military member, or a child for whom a covered military member stands in loco parentis, who is either under age 18, or age 18 or older and

**Federal Family & Medical Leave Act
Excerpts – Rules & Regulations (11-17-2008)**

incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence;

iii) To enroll in or transfer to a new school or day care facility a biological, adopted, or foster child, a stepchild, or a legal ward of the covered military member, or a child for whom the covered military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence, when enrollment or transfer is necessitated by the active duty or call to active duty status of a covered military member; and

iv) To attend meetings with staff at a school or a daycare facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with school counselors, for a biological, adopted, or foster child, a stepchild, or a legal ward of the covered military member, or a child for whom the covered military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence, when such meetings are necessary due to circumstances arising from the active duty or call to active duty status of a covered military member;

4) *Financial and legal arrangements.*

i) To make or update financial or legal arrangements to address the covered military member's absence while on active duty or call to active duty status, such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), obtaining military identification cards, or preparing or updating a will or living trust; and

ii) To act as the covered military member's representative before a federal, state, or local agency for purposes of obtaining, arranging, or appealing military service benefits while the covered military member is on active duty or call to active duty status, and for a period of 90 days following the termination of the covered military member's active duty status;

5) *Counseling.* To attend counseling provided by someone other than a health care provider for oneself, for the covered military member, or for the biological, adopted, or foster child, a stepchild, or a legal ward of the covered military member, or a child for whom the covered military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence, provided that the need for counseling arises from the active duty or call to active duty status of a covered military member;

6) *Rest and recuperation.*

i) To spend time with a covered military member who is on short-term, temporary, rest and recuperation leave during the period of deployment;

ii) Eligible employees may take up to five days of leave for each instance of rest and recuperation;

**Federal Family & Medical Leave Act
Excerpts – Rules & Regulations (11-17-2008)**

7) *Post-deployment activities.*

i) To attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the covered military member's active duty status; and

ii) To address issues that arise from the death of a covered military member while on active duty status, such as meeting and recovering the body of the covered military member and making funeral arrangements;

8) *Additional activities.* To address other events which arise out of the covered military member's active duty or call to active duty status provided that the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

b) A "covered military member" means the employee's spouse, son, daughter, or parent on active duty or call to active duty status.

1) A "son or daughter on active duty or call to active duty status" means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on active duty or call to active duty status, and who is of any age.

2) "Active duty or call to active duty status" means duty under a call or order to active duty (or notification of an impending call or order to active duty) in support of a contingency operation pursuant to: Section 688 of Title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12406 of Title 10 of the United States Code, which authorizes calling the National Guard into federal service in certain circumstances; chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation.

i) Employees are eligible to take FMLA leave because of a qualifying exigency when the covered military member is on active duty or call to active duty status in support of a contingency operation pursuant to one of the provisions of law identified in paragraph (b)(2) of this section as either a member of the reserve components (Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve and Coast Guard Reserve), or a retired member of the Regular Armed Forces or Reserve. An employee whose family

**Federal Family & Medical Leave Act
Excerpts – Rules & Regulations (11-17-2008)**

member is on active duty or call to active duty status in support of a contingency operation as a member of the Regular Armed Forces is not eligible to take leave because of a qualifying exigency.

ii) A call to active duty for purposes of leave taken because of a qualifying exigency refers to a Federal call to active duty. State calls to active duty are not covered unless under order of the President of the United States pursuant to one of the provisions of law identified in paragraph (b)(2) of this section in support of a contingency operation.

3) The active duty orders of a covered military member will generally specify if the service member is serving in support of a contingency operation by citation to the relevant section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation. A military operation qualifies as a contingency operation if it:

i) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

ii) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10 of the United States Code, chapter 15 of Title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress. 10 U.S.C. 101(a)(13).

§ 825.127 Leave to care for a covered service member with a serious injury or illness.

a) Eligible employees are entitled to FMLA leave to care for a current member of the 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, who has a serious injury or illness incurred in the line of duty on active duty for which he or she is undergoing medical treatment, recuperation, or therapy; or otherwise in outpatient status; or otherwise on the temporary disability retired list. Eligible employees may not take leave under this provision to care for former members of the Armed Forces, former members of the National Guard and Reserves, and members on the permanent disability retired list.

1) A “serious injury or illness” means an injury or illness incurred by a covered service member in the line of duty on active duty that may render the service member medically unfit to perform the duties of his or her office, grade, rank or rating.

2) “Outpatient status,” with respect to a covered service member, means the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient; or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

**Federal Family & Medical Leave Act
Excerpts – Rules & Regulations (11-17-2008)**

b) In order to care for a covered service member, an eligible employee must be the spouse, son, daughter, or parent, or next of kin of a covered service member.

1) A "son or daughter of a covered service member" means the covered service member's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered service member stood in loco parentis, and who is of any age.

2) A "parent of a covered service member" means a covered service member's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered service member. This term does not include parents "in law."

3) The "next of kin of a covered service member" is the nearest blood relative, other than the covered service member's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the service member by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered service member has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered service member, all such family members shall be considered the covered service member's next of kin and may take FMLA leave to provide care to the covered service member, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered service member's only next of kin. For example, if a covered service member has three siblings and has not designated a blood relative to provide care, all three siblings would be considered the covered service member's next of kin. Alternatively, where a covered service member has a sibling(s) and designates a cousin as his or her next of kin for FMLA purposes, then only the designated cousin is eligible as the covered service member's next of kin. An employer is permitted to require an employee to provide confirmation of covered family relationship to the covered service member pursuant to § 825.122(j).

c) An eligible employee is entitled to 26 workweeks of leave to care for a covered service member with a serious injury or illness during a "single 12- month period."

1) The "single 12-month period" described in paragraph (c) of this section begins on the first day the eligible employee takes FMLA leave to care for a covered service member and ends 12 months after 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. If an eligible employee does not take all of his or her 26 workweeks of leave entitlement to care for a covered service member during this "single 12- month period," the remaining part of his or her 26 workweeks of leave entitlement to care for the covered service member is forfeited.

2) The leave entitlement described in paragraph (c) of this section is to be applied on a per-covered service member, per-injury basis such that an eligible employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for different covered service members or to care for the same service member with a subsequent serious injury or illness, except that no more than 26 workweeks of leave may be taken within any "single 12-month period." An eligible employee may take more than one period of 26 workweeks of leave to care for a covered service member with more than one serious injury or illness only when the serious

**Federal Family & Medical Leave Act
Excerpts – Rules & Regulations (11-17-2008)**

injury or illness is a subsequent serious injury or illness. When an eligible employee takes leave to care for more than one covered service member or for a subsequent serious injury or illness of the same covered service member, and the “single 12-month periods” corresponding to the different military caregiver leave entitlements overlap, the employee is limited to taking no more than 26 workweeks of leave in each “single 12- month period.”

3) An eligible employee is entitled to a combined total of 26 workweeks of leave for any FMLA-qualifying reason during the “single 12-month period” described in paragraph (c) of this section, provided that the employee is entitled to no more than 12 weeks of leave for one or more of the following: because of the birth of a son or daughter of the employee and in order to care for such son or daughter; because of the placement of a son or daughter with the employee for adoption or foster care; in order to care for the spouse, son, daughter, or parent with a serious health condition; because of the employee’s own serious health condition; or because of a qualifying exigency. Thus, for example, an eligible employee may, during the “single 12-month period,” take 16 weeks of FMLA leave to care for a covered service member and 10 weeks of FMLA leave to care for a newborn child. However, the employee may not take more than 12 weeks of FMLA leave to care for the newborn child during the “single 12-month period,” even if the employee takes fewer than 14 weeks of FMLA leave to care for a covered service member.

4) In all circumstances, including for leave taken to care for a covered service member, the employer is responsible for designating leave, paid or unpaid, as FMLA-qualifying, and for giving notice of the designation to the employee as provided in § 825.300. In the case of leave that qualifies as both leave to care for a covered service member and leave to care for a family member with a serious health condition during the “single 12-month period” described in paragraph (c) of this section, the employer must designate such leave as leave to care for a covered service member in the first instance. Leave that qualifies as both leave to care for a covered service member and leave taken to care for a family member with a serious health condition during the “single 12- month period” described in paragraph (c) of this section must not be designated and counted as both leave to care for a covered service member and leave to care for a family member with a serious health condition. As is the case with leave taken for other qualifying reasons, employers may retroactively designate leave as leave to care for a covered service member pursuant to § 825.301(d).