



# Family and Medical Leave Act: Update

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# Enhanced Enforcement

On the 20th anniversary,

DOL announced it was increasing FMLA enforcement.

WH's 2014 budget provided \$234 million for DOL's Wage and Hour Division:

- Increase of about \$14 million
- \$3.4 million specifically for increased enforcement of FMLA.

No indication that enforcement will slow down.





# Covered Employer

“Employer” any person engaged in commerce or in any industry or activity affecting commerce which:

- Employs 50 or more employees
- For 20 or more workweeks in the current or preceding calendar year
- Not necessarily consecutive periods



# Covered Employer

- Once a “covered employer,” employer remains covered until it no longer has 50 or more employees for 20 (nonconsecutive) workweeks in the current and preceding calendar year.





# Covered Employer

- Special rules for:
  - related and affiliated employers,
  - joint employers, and
  - successor employers.





# Covered Employer – Integrated Employer Test

- Separate entities deemed a single employer under integrated employer test.
- Where integrated employer, employees of all entities making up the integrated employer will be counted.





# Covered Employer – Integrated Employer Test

- Integrated employer based on entire relationship.
- Factors include:
  - (i) common management;
  - (ii) interrelation of operations;
  - (iii) centralized control of labor relations; and
  - (iv) degree of common ownership/financial control.

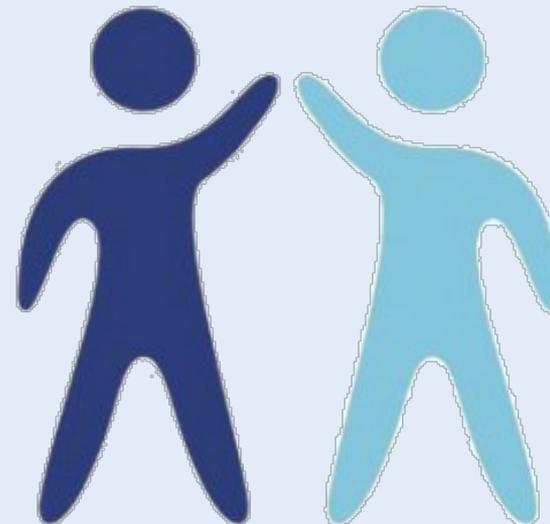




# Covered Employer – Joint Employer

Joint employer –

- Two or more businesses exercise some control over the work or working conditions of employee
- May be separate and distinct entities





# Covered Employer – Joint Employer

Where employee performs work that benefits 2 or more employers, or works for 2 or more employers at different times during workweek, joint employment relationship generally will be considered, where:



There is an arrangement to share an employee's services or to interchange employees

One employer acts directly or indirectly in the interest of the other employer in relation to employee

One employer controls, is controlled by, or is under common control with other employer

# Covered Employer – Joint Employer

## Professional Employer Organization (PEO)

- Determination of whether PEO is joint employer turns on economic realities and based on facts and circumstances.
- No joint employment relationship when PEO merely performs administrative functions.
- But, if PEO has right to hire, fire, assign, or direct and control client's employees, can be a joint employer.



# Covered Employer – Joint Employer

- In joint employment relationship, only primary employer is responsible for required notices, providing leave, and maintaining health benefits.
- Primary employer is entity with authority to hire and fire, assign or place employee, make payroll, and provide employee benefits.





# Covered Employer – Joint Employer

- Joint employees must be counted by both employers to determine employer coverage and employee eligibility, whether or not maintained on one employer's payroll.



For example, employer who jointly employs 15 workers from a temporary placement agency and 40 permanent workers is covered by FMLA.



# Covered Employee

## “Employee”

- As defined under FLSA
- Broader than common law test
- Economic realities test



# Covered Employee

- Employee must be employed:
  - At worksite where 50 or more employees are employed within 75 miles,
  - For at least 12 months as of date leave expected to start, and
  - Worked at least 1250 hours during previous 12-month period.



# Covered Employee

Eligible employee's 1250 hours in preceding 12 months:

Generally does not include paid or unpaid leave (but there are exceptions).



Includes overtime.



Determined as of date leave commences.





# Covered Employees

- The 12 months an employee must have been employed need not be consecutive months, but
  - employment prior to break in service of 7 years or more is not be counted, unless:
    - absence due to USERRA-covered service, or
    - written agreement, including collective bargaining agreement, provides prior service included.





# Covered Employees

If employee is maintained on payroll for *any* part of a week, including periods of paid or unpaid leave during which other benefits or compensation are provided (*e.g.*, workers' compensation), the week counts as an entire week of employment.





# Covered Employees- Special Rules

- Airline industry 
- Public and private elementary and secondary schools 
- Employees outside United States or any territory or possession of the United States





# Period of Leave

- Generally, up to 12 weeks of leave.
- 26 weeks of leave during single 12- month period available to care for “covered servicemember” with “serious injury or illness.”





# Qualifying Events - Birth

## Birth and newborn care:

- Both mother and father eligible for leave,
- Must be taken within 12 months of birth,
- If both parents work for one employer, only get total of 12 weeks *for same qualifying event*.



# Qualifying Events - Birth

Mother entitled to leave for:

- incapacity due to pregnancy,
- prenatal care, and
- own serious health condition following birth.



Mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health care provider during absence, and even if absence does not last for more than 3 consecutive calendar days.

For example, a pregnant employee may be unable to report to work because of severe morning sickness.



# Qualifying Events - Birth

In addition to leave for birth, Father is entitled to FMLA leave if needed:

- To care for pregnant spouse who is incapacitated;
- To care for her during her prenatal care; or
- To care for her following the birth of child if the spouse has a serious health condition.





# Qualifying Events - Birth

Both mother and father entitled to leave if needed to care for a child with a serious health condition, even if employed by the same employer.





# Qualifying Events - Birth

Intermittent or reduced schedule only if employer agrees.

However, employer's agreement is not required if intermittent leave needed due to serious health condition of mother or newborn.



# Qualifying Events - Birth

- Employer may require temporary transfer, during period of intermittent or reduced leave schedule:
  - To available alternative position,
  - For which employee is qualified, and
  - Which better accommodates recurring periods of leave than regular position.
- However, must comply with other laws, e.g., ADA.





# Qualifying Events – Adoption or Foster Care

Adoption or foster care:

- Both mother and father eligible for leave,
- must be taken within 12 months of birth,
- if both parents work for one employer, only get total of 12 weeks *for same qualifying event*.



# Qualifying Events – Adoption or Foster Care

- Includes leave required for adoption or foster care to proceed, such as:
  - counseling sessions,
  - court appearances,
  - attorney consultations, or
  - travel to another country to complete adoption.
- Otherwise, intermittent or reduced schedule leave allowed on same basis as for birth of child.





# Qualifying Events – Serious Health Condition

- Spouse, child or parent:
  - Can *require* intermittent leave if medically necessary,
  - If both parents work for same employer, only get total of 12 weeks *for same qualifying event*.



# Qualifying Events – Serious Health Condition

Employee's own “serious health condition” if:

- Employee unable to perform the functions of his/her position,
- Functions of position same as under ADA.

Intermittent leave *required* if medically necessary.





# Qualifying Events – Serious Health Condition

“Serious health condition” means illness, injury, impairment or physical or mental condition that involves:

- Inpatient care, or
- Continuing treatment by a health care provider.





# Qualifying Events – Serious Health Condition

“Inpatient care” means overnight stay in a hospital, hospice, or residential medical care facility, or any subsequent treatment in connection with inpatient care.





# Qualifying Events – Serious Health Condition

## Continuing treatment means:

Incapacity of more than 3 consecutive, full calendar days, and any subsequent treatment or incapacity relating to the same condition.

Must also involve:

- Treatment 2 or more times, within 30 days of first day of incapacity, unless *extenuating circumstances* exist, by a health care provider (HCP), nurse under direct supervision of HCP, or provider of health care services (e.g., physical therapist) under orders of, or on referral by HCP; or
- Treatment by HCP on at least 1 occasion, which results in a regimen of continuing treatment under the supervision of the HCP.





# Qualifying Events – Serious Health Condition

- Treatment by a HCP means in-person visit to HCP.
- First treatment visit must take place within 7 days of the first day of incapacity.





# Qualifying Events – Serious Health Condition

*Extenuating circumstances* means circumstances beyond employee's control that prevent follow-up visit from occurring.

Depends on facts.

Example: Extenuating circumstances exist if HCP determines that second visit is needed, but does not have available appointments.





# Qualifying Events – Serious Health Condition

- A serious health condition involving continuing treatment includes:
  - Incapacity due to pregnancy or prenatal care,
  - Permanent or long-term conditions involving period of incapacity, e.g., where condition for which treatment is not effective,
  - Conditions requiring multiple treatments.



# Qualifying Events – Serious Health Condition

- *Chronic conditions.* A chronic serious health condition is one that:

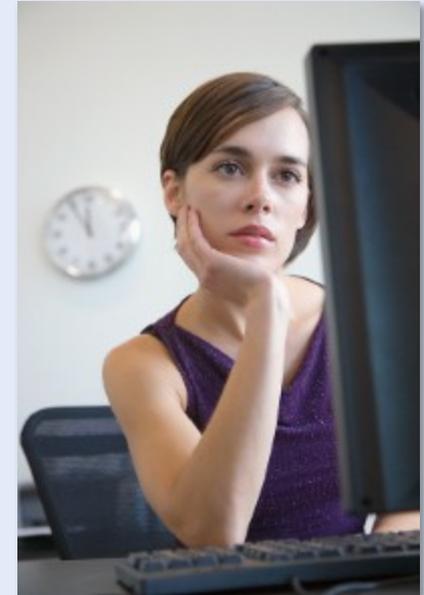


- Requires periodic visits (defined as at least twice a year) for treatment by a HCP, or by a nurse under direct supervision of HCP;
- Continues over an extended period of time (including recurring episodes of single underlying condition); and
- May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy).



# Intermittent/Reduced Leave

- *Intermittent leave* is leave taken in separate blocks of time due to a single qualifying reason.
- *Reduced leave schedule* is a leave schedule that reduces employee's usual number of working hours per workweek, or hours per workday, e.g. from full-time to part-time.





# Intermittent/Reduced Leave

- Available for:
  - Serious health condition of spouse, parent, son, or daughter,
  - Employee's own serious health condition,
  - Serious injury or illness of a covered servicemember, or
  - Qualifying exigency.
- Medical necessity-
  - Must show that medical need can best be accommodated through intermittent or reduced leave schedule,
  - Not required for qualifying exigency.



# Intermittent/Reduced Leave

- If foreseeable, employee must provide 30 days' notice.
- If emergency, employee must
- provide notice “as soon as practicable.”
- Employers can ask about medical necessity for intermittent/reduced schedule leave as part of the medical certification.





# Intermittent/Reduced Leave

- Employer can limit leave increments to shortest period that payroll system uses to account for absences, if one hour or less.
- For exempt employees, can make deductions for leave taken without losing exempt status under the FLSA.





# Paid or Unpaid Leave

- Employer can require that employee substitute paid leave for unpaid FMLA leave.
- Employee can elect to substitute paid leave for unpaid leave.
- Substitute means that paid leave accrued pursuant to employer's policies will run concurrently with the unpaid FMLA leave.





# Paid or Unpaid Leave

- If employer requires or employee elects to substitute paid leave, employee is subject only to conditions of the employer's paid leave plan.
- If employee does not comply with additional requirements in paid leave policy, employee not entitled to substitute paid leave, but remains entitled to take unpaid FMLA leave.
- Employers may not discriminate against employees on FMLA leave in administration of paid leave policies.

# Paid or Unpaid Leave

- If employee uses paid leave under circumstances which do not qualify as FMLA leave, leave will not count against the employee's FMLA leave entitlement.



**MEDICAL LEAVE REQUEST**

Employee Information		First	Last	Mobile	Home
Name (Last)				Number	Number
Address (Mailing Address)		City	State	Zip	Other Telephone
E-Mail Address					
Dates Requested					

Yes No



# Paid or Unpaid Leave

- Leave taken pursuant to a disability leave plan, including workers' compensation, is FMLA leave and counted in FMLA leave entitlement, if it satisfies requirements for serious health condition.
- Employer may designate leave as FMLA leave and count the leave against the employee's FMLA leave entitlement.
- Because leave pursuant to a disability benefit plan is not unpaid, the provision for substitution of the employee's accrued paid leave is inapplicable, and neither employee nor employer may require the substitution of paid leave.
- However, employer and employee may agree, where state law permits, to have paid leave supplement disability plan benefits, i.e., where a plan only provides replacement income for two-thirds of employee's salary.



# Medical Benefit Continuation

- Must continue group health plan benefits on same conditions as when employee was at work.
  - Ex.: If dependent coverage is provided to employee, dependent coverage must be maintained during FMLA leave.
- If employer provides a new health plan or changes plan/benefits during FMLA leave, employee is entitled to new or changed plan/benefits as if the employee were not on leave.



# Medical Benefit Continuation

- Continuation of medical plan benefits includes payment terms.
- Employer and employee responsible for paying their share of premiums that existed prior to leave.





# Medical Benefit Continuation

Employer has following options for obtaining payment from the employee:

- May require that payment be made directly to employer or insurance carrier, but no additional charge may be added
- May require employees to pay their share in any of the following ways:
  - payment due at the same time as if made by payroll deduction;
  - payment due on same schedule as payments under COBRA;
  - payment prepaid pursuant to a cafeteria plan at employee's option;
  - employer's existing rules for payment by employees on leave without pay, provided that such rules do not require prepayment; or,
  - another system voluntarily agreed to between employer and employee.

Employer must provide employee with advance written notice of terms and conditions under which payments must be made.



# Medical Benefit Continuation

- If employee fails to make payments when due, employer may terminate insurance coverage, but only after a 30-day grace period and written notice of potential termination.
- Employee can choose not to continue coverage during leave, but when he returns to work, coverage must be reinstated immediately with no waiting period.





# Medical Benefit Continuation

- If employee does not return, employer can demand repayment of amounts paid for coverage
  - Unless failure to return is do to continuation, recurrence, or onset of serious health condition or other circumstances beyond the employee's control



# Reinstatement

- Employee is entitled to be restored to:
  - Position of employment held when leave commenced, or
  - Equivalent position.
- Equivalent position must be “virtually identical,” i.e., same pay, benefits and working conditions



# Reinstatement

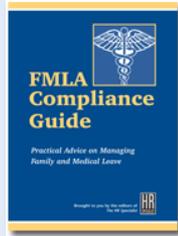
- If employee returns with a disability, ADA may apply.
- Employee not entitled to same position if not able to perform essential functions of the job, with accommodation.





# Employer Notice Requirements

- Employer required to post notice and keep notice posted, in conspicuous places on its premises, explaining FMLA's provisions.
- Employer also must advise employees of rights in *any* handbook or other written materials that the employer maintains to advise employees of their benefits or leave rights.
- If employer does not have a handbook, employer must give written guidance when employee is hired –DOL prototype notice (WHD Publication 1420) satisfies this requirement.
- If employer fails to post, it can relieve employee of notification responsibilities





# Employer Notice Requirements

- When employee requests FMLA leave, or employer has knowledge that employee's leave may be for FMLA reason, employer must notify employee of employee's eligibility for FMLA leave within 5 business days.
- If employee is not eligible for FMLA leave, notice must state at least one reason why the employee is not eligible.
- In addition, employer must provide specific notice of rights and responsibilities.





# Employer Notice Requirements

- Such specific notice must include:
  - (i) That leave may be designated and counted against the employee's annual FMLA leave entitlement;
  - (ii) Any requirements for employee to furnish certification of a serious health condition, serious injury or illness, or qualifying exigency, and consequences of failing to do so;
  - (iii) Employee's right to substitute paid leave, whether employer will require the substitution of paid leave, conditions related to any substitution, and employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave;
  - (iv) Any requirement for employee to make premium payments to maintain health benefits, the arrangements for making such payments, and possible consequences of failure to make such payments on a timely basis;
  - (v) Employee's status as a key employee and the potential consequence that restoration may be denied following FMLA leave;
  - (vi) Employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave; and
  - (vii) Employee's potential liability for payment of health insurance premiums paid by employer during the employee's unpaid FMLA leave if the employee fails to return to work after leave.



# Employer Notice Requirements

## *Designation Notice*

- Employer is responsible for designating leave as FMLA-qualifying, and for giving notice of the designation to the employee.
- When employer has enough information to determine whether leave is being taken for a FMLA-qualifying reason, employer must notify employee whether leave will be designated and counted as FMLA leave within five business days, absent extenuating circumstances.
- Only one notice of designation is required for each FMLA-qualifying reason per applicable 12-month period.



# Employer Notice Requirements

- Failure to follow notice requirements may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights.
- Employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary damages, and for appropriate equitable or other relief, including employment, reinstatement, and promotion.

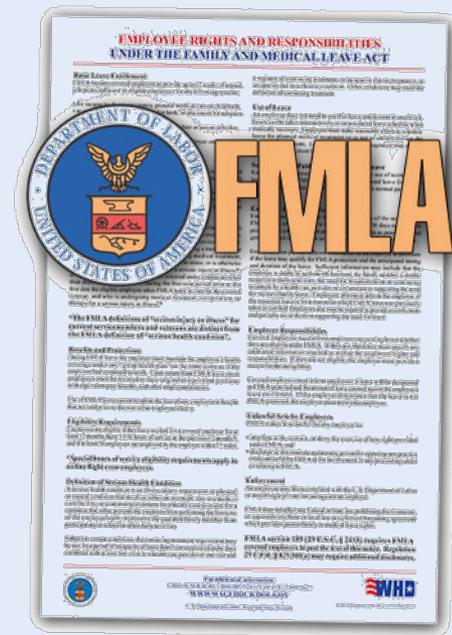


# Employee Notice Requirements

- Employee must provide at least 30 days advance notice before leave is to begin if need is foreseeable based on:
  - an expected birth, placement for adoption or foster care,
  - planned medical treatment for a serious health condition of the employee or of a family member, or
  - planned medical treatment for a serious injury or illness of a covered servicemember.
- If 30 days notice not practicable, notice must be given as soon as practicable.

# Employee Notice Requirements

- Employee must provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave,
- Notice must include the anticipated timing and duration of the leave.





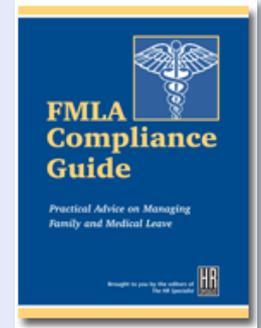
# Employee Notice Requirements

- Depending on circumstances, notice may include information that:
  - Condition renders the employee unable to perform the functions of the job;
  - Employee is pregnant or has been hospitalized overnight;
  - The employee or the employee's family member is under the continuing care of HCP;
  - If leave is due to a qualifying exigency, that a military member is on covered active duty or call to covered active duty status and that the requested leave is for one of the reasons permissible under FMLA;
  - If leave is for a family member, that condition renders family member unable to perform daily activities, or that the family member is a covered servicemember with a serious injury or illness;
  - And anticipated duration of absence, if known.



# Employee Notice Requirements

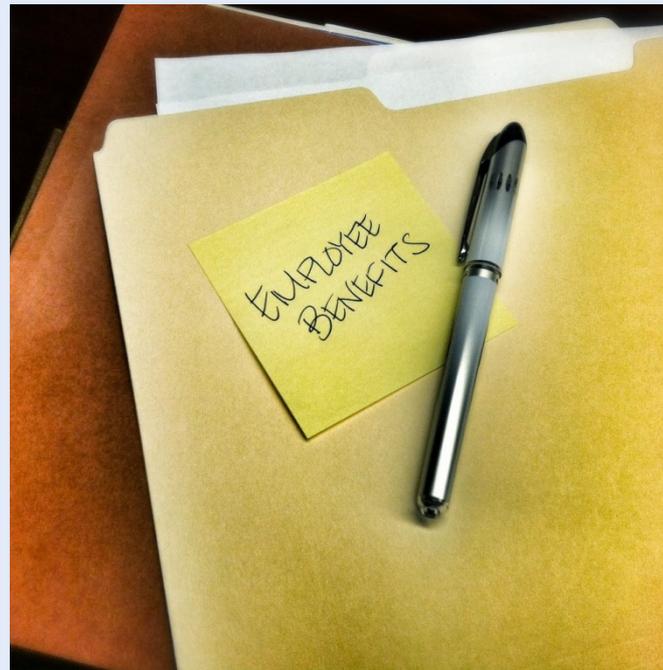
- If employer has previously provided FMLA-protected leave for a qualifying event, employee must specifically reference qualifying reason for leave or need for FMLA leave.
- Employer has burden of inquiring further if it is necessary to have more information about whether FMLA leave is being sought.





# Employee Notice Requirements

- Employer may require employee to comply with notice and procedural requirements in policies for requesting leave.





# Certifications

- Employer may require certification:
  - By HCP of serious health condition, or
  - That employee's leave due to qualifying exigency or to care for a covered servicemember with a serious injury or illness.
- Employer must give notice of requirement each time a certification is required.



# Certifications

- Employer should request certification when employee gives notice of the need for leave or within five business days.
- In the case of unforeseen leave, request should be within five business days after the leave commences.



# Certifications

- Employer may request certification at a later date if employer has reason to question appropriateness of the leave or its duration.
- Employee must provide certification within 15 calendar days after the employer's request, unless it is not practicable under the particular circumstances.





# Certifications

- When employer requests certification, employer must advise employee of consequences for failure to provide adequate certification.
- If the employee fails to provide certification, employer may deny FMLA leave.
- Employer may require new medical certification in each subsequent leave year.



# Military Leave





# FMLA - Military Leave

- FMLA provides special leave related to “covered servicemember.”
- Leave available to care for “covered servicemember” with a “serious illness or injury.”
- Leave also available due to “qualifying exigency.”



# FMLA - Military Leave

- *Covered servicemember* is:
  - Current member of the Armed Forces, including National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is in outpatient status, or is on temporary disability retired list, for serious injury or illness.
  - Covered veteran undergoing medical treatment, recuperation or therapy for serious injury or illness.



# FMLA - Military Leave

- *Covered veteran* is individual who was:
  - Member of Armed Forces (including National Guard or Reserves), and
  - Discharged or released under conditions other than dishonorable during five-year period prior to first date eligible employee takes FMLA leave to care for covered veteran.





# FMLA - Military Leave

*Serious injury or illness* means injury or illness that:

- Was incurred by the covered service-member in line of duty on active duty, or
- Existed before member's active duty and was aggravated by service in the line of duty on active duty, and
- May render member medically unfit to perform the duties of member's office, grade, rank or rating.





# FMLA - Military Leave

For covered veteran, serious illness or injury means injury or illness incurred in line of duty on active duty (or existed before member's active duty and aggravated by service in line of duty on active duty) and manifested before or after member became a veteran, and is:



# FMLA - Military Leave

A continuation of serious injury or illness incurred or aggravated when covered veteran was member of Armed Forces and rendered service-member unable to perform the duties of his or her office, grade, rank, or rating;

A physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating of 50% or greater, based, in whole or in part, on the condition precipitating the need for military caregiver leave; or

A physical or mental condition that substantially impairs the covered veteran's ability to secure or follow substantially gainful occupation by reason of a disability or disabilities, or would do so absent treatment; or

An injury, including a psychological injury, on basis of which covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.



# FMLA - Military Leave

- For care of a covered servicemember, leave is available to spouse, son, daughter, parent, or next of kin.
- Next of kin means nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter. Regulations provide the order of priority for determining next of kin.
- When servicemember has made no designation, and multiple family members have same level of relationship to covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to care for covered servicemember, either consecutively or simultaneously.

# FMLA - Military Leave

Employees are eligible for leave due to “qualifying exigency” if spouse, parent, son or daughter is:

- On covered active duty, or
- On call to covered active duty status, or
- Has been notified of an impending call or order to active duty.



# FMLA - Military Leave

- Qualifying exigency leave is available for issues related to:
  - Short notice deployment,
  - Military events and related activities,
  - Childcare and school activities,
  - Financial and legal arrangements,
  - Counseling,
  - Rest and recuperation,
  - Post-deployment activities, and
  - Parental care, and
  - Additional events arising out of call or order to duty.



# FMLA - Military Leave

- Qualifying exigency leave also available for additional activities that arise out of call or order to active duty, provided:
  - Employer agrees that leave qualifies and exigency, and
  - Agreement on timing and duration leave.





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