Family Friendly Leave Act

Overview

The Federal Employees Family Friendly Leave Act, or Family Friendly Leave Act, became effective in 1994. It expired three years later, but its concepts of sick leave for family care and bereavement absences are incorporated in present law at 5 USC 6307 and OPM regulations at 5 CFR Part 630.

The regulations grant covered federal employees up to 104 hours of sick leave, each year, to care for a family member, or to arrange for or attend the funeral of a family member. The amount of sick leave taken for adoption-related activities is not limited to 104 hours and does not count toward the annual 104-hour limit under the FFLA.

Confusion sometimes arises because the FFLA sounds similar to the Family and Medical Leave Act and, like that act, grants leave for the care of a family member. However, there are major differences regarding the type and length of leave, definition of family member, and situations covered.

This Quick Start Guide covers the following Key Points:

The basics

- **Editor's note:** The Office of Personnel Management issued revised sick leave regulations, effective Jan. 3, 2011, governing the use of sick leave and advanced sick leave for serious communicable diseases and the substitution of up to 26 weeks of sick leave for unpaid Family and Medical Leave Act leave to care for a seriously injured or ill covered servicemember. OPM also reorganized and renumbered the existing sick leave regulations. Before this, on June 14, 2010, OPM also issued final regulations that made broader changes to the sick leave regulations.
- The FFLA's provisions are incorporated into the OPM's sick leave regulations at 5 CFR 630.401. The sick leave definitions are at 5 CFR 630.201.
- FFLA leave is paid sick leave and is normally available for up to 104 hours, according to 5 CFR 630.401(b). For part-time employees, or employees with an uncommon tour of duty, the leave time is generally limited to the number of hours of sick leave normally accrued during a leave year.
- For employees who provide care for a family member with a serious health condition (see 5 CFR 630.401(a)(3)(ii)), there is a higher entitlement. Such employees may have up to 480 hours of sick leave. For part-time employees or employees with an uncommon tour of duty, the leave time is equal to 12 times the average number of hours in his scheduled tour of duty each week. 5 CFR 630.401(c). If an employee has already used some of the 104 hours of normal FFLA leave, the 480 hours allowed to care for a family member with a serious health condition is reduced by the time already used. 5 CFR 630.401(d).
- Employees who use the full 480 hours to care for a family member may not use further FFLA for family care or bereavement. 5 CFR 630.401(d).
- If the number of hours in the employee's tour of duty changes during the leave year, the sick leave entitlement for family care or bereavement must be recalculated based on the new tour of duty. 5 CFR 630.401(e).

Eligibility

- The FFLA allows employees to take sick leave when they:
    1. Are incapacitated from illness, injury, pregnancy or childbirth. 5 CFR 630.401(a)(2).

2. Provide care for a qualified family member who is incapacitated by a health condition, or to attend to a family member receiving medical, dental or optical treatment. 5 CFR 630.401(a)(3)(i).
3. Provide care for a family member with a serious health condition. 5 CFR 630.401(a)(3)(ii).
4. Provide care for a family member who would jeopardize the health of others by that family member's presence in the community because of exposure to a communicable disease. 5 CFR 630.401(a)(3)(iii).
5. Attend or arrange a family member's funeral. 5 CFR 630.401(a)(4).
6. Must be absent for reasons relating to the adoption of a child. This includes appointments with adoption agencies, social workers and attorneys; court proceedings; required travel; and any other activities necessary to facilitate the adoption. 5 CFR 630.401(a)(6).

Definitions

Historical note: In 2013, the U.S. Supreme Court ruled that the Defense of Marriage Act's definition of "marriage" as a legal union between one man and one woman was unconstitutional. U.S. v. Windsor, *113 LRP 26537, 133 S. Ct. 2675 (U.S. 2013). Under* Windsor, *same-sex spouses of federal employees have the same rights to benefits as opposite-sex spouses. For more details, see Quick Start Guide: Domestic Partners and Same-Sex Spouses.*

- Under 5 CFR 630.201 and 630.401, the term "family members" includes, spouses and their parents, parents and their spouses, children and their spouses, siblings and their spouses, grandparents/grandchildren and their spouses, domestic partners and their parents, and "any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship."
- On June 14, 2010, OPM issued final regulations that change the definition of family member and immediate relative for purposes of sick leave, funeral leave, voluntary leave transfer, voluntary leave bank, and emergency leave transfer. The regulations provide more specific examples of relationships that are covered under "any individual related by blood or affinity." Examples include same and opposite-sex domestic partners, grandparents, and grandchildren. For more on sick leave related to domestic partners or same-sex spouses, see Quick Start Guide: Domestic Partners and Same-Sex Spouses.
- Final rules also clarify that the definition of parent is a "biological, adoptive, step or foster parent of the employee when the employee was a minor," and that a domestic partner's parent is included in the definition of family member.
- The final rules replace the term "children" in the definition of family member with "sons" and "daughters," which include biological, adopted, stepchildren, legal wards, and relationships where the employee stands or stood *in loco parentis*. The rules establish that under the expanded definition, a domestic partner's son or daughter is included as a family member.
- The regulations define domestic partner as "an adult in a committed relationship with another adult, including both same-sex and opposite-sex relationships." A committed relationship is defined as "one in which the employee, and the domestic partner of the employee, are each other's sole domestic partner and share responsibility for a significant measure of each other's common welfare and financial obligations." The regulations do not require agencies to obtain formal documentation of the committed relationship.
- An employee may take leave to care for "a family member receiving medical, dental, or optical examination or treatment," according to 5 CFR 630.401(a)(3)(i).

Leave advances

- When required, a maximum of 240 hours of sick leave may be advanced to full-time employees for a serious disability or ailment, or for the adoption of a child. 5 USC 6307(d). 5 CFR 630.402(a)(1).
- For a part-time employee, or an employee on an uncommon tour of duty, the maximum amount of sick leave an agency may advance must be prorated according to the number of hours in the employee's regularly scheduled administrative workweek. 5 CFR 630.402(b).
- In a presidential memorandum issued on Jan. 15, 2015, President Obama directed agencies to ensure that, to the extent permitted by law, their policies offer 240 hours of advanced sick leave, at the request of an employee and in appropriate circumstances, in connection with the birth or adoption of a child or for other sick leave eligible uses. This benefit must be provided regardless of existing leave balances. Presidential Memorandum -- Modernizing Federal Leave Policies (01/15/15).
- In response to the Jan. 15, 2015, presidential memorandum that was issued, OPM determined that a new handbook focusing on leave and workplace flexibilities available to employees for childbirth, adoption, and foster care purposes would be the most appropriate guidance to provide to agencies. The handbook contains guidance on advanced sick leave and annual leave policies as required by the presidential memorandum while emphasizing the various leave entitlements and flexibilities available to assist employees. OPM Handbook on Leave and Workplace Flexibilities for Childbirth, Adoption, and Foster Care (April 2015).

Leave abuse

- HR professionals who suspect that employees are abusing the FFLA's sick leave provisions may issue letters of requirement, which direct employees to obtain medical certification for every instance of sick leave use. So, in such cases, even if the employee uses one hour to go to a doctor's appointment, he must submit a medical certificate for that absence. Requests for additional information may be made in any case where abuse is suspected, including those involving domestic partners.

Equal Employment Opportunity

- The Equal Employment Opportunity Commission does not enforce alleged violations of the FFLA, so such claims brought before the EEOC will be dismissed. *Reese v. Department of Agriculture,* 101 FEOR 15711 (EEOC OFO 2000).

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Family Responsibilities and EEO

Overview

A number of policies and procedures are aimed at helping federal employees achieve an appropriate balance between their work and their personal lives. Despite these opportunities, federal employees sometimes experience problems at work that are related to their familial relationships or responsibilities. These problems don't always have EEO implications, but, as this Quick Start Guide explains, issues can arise that fall within federal antidiscrimination laws. Indeed, guidance issued by the Equal Employment Opportunity Commission notes that: "Although the federal EEO laws do not prohibit discrimination against caregivers per se, there are circumstances in which discrimination against caregivers might constitute unlawful disparate treatment." EEOC Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities.

In general

- "Employment decisions that discriminate against workers with caregiving responsibilities are prohibited by Title VII if they are based on sex or another protected characteristic, regardless of whether the employer discriminates more broadly against all members of the protected class. For example, sex discrimination against working mothers is prohibited by Title VII even if the employer does not discriminate against childless women." [Footnote omitted.] EEOC Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities.

- "Title VII does not prohibit discrimination based solely on parental or other caregiver status, so an employer does not generally violate Title VII's disparate treatment proscription if, for example, it treats working mothers and working fathers in a similar unfavorable (or favorable) manner as compared to childless workers." EEOC Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities.

- "Intentional sex discrimination against workers with caregiving responsibilities can be proven using any of the types of evidence used in other sex discrimination cases." EEOC Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities.

Stereotyping

- ***Hadley:*** One way that gender-based subjective criteria are infused into the employment arena is through the use of stereotypes. When such stereotypes are based on sex, their use is prohibited. *Hadley Guide to Federal Sector Equal Employment Law and Practice:* Gender-Based Subjective Criteria.

- "Because stereotypes that female caregivers should not, will not, or cannot be committed to their jobs are sex-based, employment decisions based on such stereotypes violate Title VII. [Footnote omitted.]" EEOC Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities.

- "Employment decisions based on such stereotypes violate the federal antidiscrimination statutes, [footnote omitted] even when an employer acts upon such stereotypes unconsciously or reflexively. [Footnote omitted.]" EEOC Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities.

- "Adverse employment decisions based on gender stereotypes are sometimes well-intentioned and perceived by the employer as being in the employee's best interest. [Footnote omitted]. For example, an employer might assume that a working mother would not want to relocate to another city, even if it would mean a promotion. [Footnote omitted.]" EEOC Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities.

- The complainant, a special agent with the FBI who had two children, was not subjected to sex discrimination when she was removed from a part-time program and required to work full time. The agency legitimately explained that the change was based on insufficient staffing. Although a female regional representative for the Female Special Agent Advisory Committee reflected a gender-based stereotype when she asked the complainant if she wanted to be an FBI agent or a mom, there was no evidence that the representative was involved in the complainant being required to work full time. *Camden v. Department of Justice, Federal Bureau of Investigation*, 112 LRP 40863, EEOC No. 0120093506 (EEOC OFO 2012).

- "[E]mployment decisions that are based on an employee's actual work performance, rather than assumptions or stereotypes, do not generally violate Title VII, even if an employee's unsatisfactory work performance is attributable to caregiving responsibilities." *Ramirez v. Social Security Administration*, 112 LRP 5250, EEOC No. 0120101227 (EEOC OFO 2012).

Disparate treatment

- Female special agents for the Drug Enforcement Administration were subjected to sex discrimination when the agency denied them foreign assignments and promotions to supervisor positions. Males were routinely selected over equally or better-qualified female applicants. The agency did not explain why it only interrogated female applicants about matters such as their child care arrangements, pregnancies, and their husbands' willingness to move overseas. *Garcia, et al. v. Department of Justice, Drug Enforcement Administration*, 113 LRP 25207, EEOC No. 0120122033 (EEOC OFO 2013).

- A correctional officer was subjected to sex discrimination when she was terminated during her probationary period for sick leave abuse. Although she was performing competently, she was terminated while similarly situated male coworkers were not penalized. If the agency had asked for medical documentation pursuant to its leave abuse policy, the documentation would have substantiated that the complainant was legitimately using leave for her own illness or for the medical needs of her child. Evidence suggested that she was subjected to heightened standards and increased scrutiny because of her gender and caregiver responsibilities. *Isabelle G. v. Department of Justice, Federal Bureau of Prisons*, 116 LRP 956, EEOC No. 0120130362 (EEOC OFO 2015).

- A witness protection inspector for the U.S. Marshals Service was subjected to sex discrimination when she was denied -- after she announced her pregnancy -- a lateral transfer for which she was the most qualified candidate. Rather than making a decision based on qualifications, agency officials decided that her family should not be separated by her being moved to a new city. Male employees were not subjected to these considerations with regard to relocation decisions. *Doe v. Department of Justice, U.S. Marshals Service*, 112 LRP 7785, EEOC No. 0720090006 (EEOC OFO 2012).

- The U.S. Postal Service subjected the complainant to sex discrimination when it terminated her for attendance problems. The complainant, a single mother who needed to drop her child off at school on her way to work, admitted that she was often late, but she noted that she was only late by a few minutes each time. The manager could not explain why she was treated less favorably than a similarly situated male employee with more egregious attendance problems. *Bridgewater v. U.S. Postal Service*, 107 LRP 54755, EEOC No. 0720070028 (EEOC OFO 2007).

- A GS-5 firefighter was subjected to sex discrimination when she was involuntarily reassigned to fire prevention after informing her supervisor that she was pregnant. As a result of the reassignment, her pay was reduced because fire prevention did not provide for premium pay. The agency could not explain why similarly situated male employees were allowed to retain premium pay when they were under medical restrictions. *Kiolbassa v. Department of the Navy*, 106 LRP 28785, EEOC No. 01A44221 (EEOC OFO 2006).

- The complainant was terminated from her psychologist position based on substantially unfounded criticisms leveled against her by a female supervisor who was jealous of the complainant's pregnancy and family life. *Bergmann v. Department of Justice*, 97 FEOR 3179, EEOC No. 05960429 (EEOC 1997).

Hiring and promotion

- "Focus on the applicant's qualifications for the job in question. Do not ask questions about the applicant's or employee's children, plans to start a family, pregnancy, or other caregiving-related issues during interviews or performance reviews." Employer Best Practices for Workers with Caregiving Responsibilities.

- The Department of the Navy engaged in sex discrimination when it failed to select the complainant for a facilities manager position. The EEOC found it significant that the complainant testified she was told that as a mother, she would not want a job that required travel. It also noted evidence that

she already performed the work at issue in an outstanding manner, and that agency policy generally favored current employees to fill positions. *Thorogood v. Department of the Navy*, 107 LRP 67834, EEOC No. 0720070072 (EEOC OFO 2007).

- "Ensure that job openings, acting positions, and promotions are communicated to all eligible employees regardless of caregiving responsibilities." Employer Best Practices for Workers with Caregiving Responsibilities.
- "The impact of work-family conflicts ... extends to professional workers, contributing to the maternal wall or 'glass ceiling' that prevents many women from advancing in their careers. As a recent EEOC report reflects, even though women constitute about half of the labor force, they are a much smaller proportion of managers and officials. [Footnote omitted.]" EEOC Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities.

Training

- "Ensure that employees are given equal opportunity to participate on complex or high-profile work assignments that will enhance their skills and experience and help them ascend to upper-level positions." Employer Best Practices for Workers with Caregiving Responsibilities.

Leave

- "Ensure that leave policies exist and are available to male and female employees on an equal basis. Train managers to ensure that both male and female employees are aware of leave policies and are not implicitly or explicitly discouraged from requesting leave." Employer Best Practices for Workers with Caregiving Responsibilities.
- In response to the complainant's EEO allegations, the agency concluded that its parental leave policy was facially discriminatory in that it provided women with up to 12 months of parental leave, but allowed men only up to nine months of parental leave. The agency stated that it would modify its leave policies, but the EEOC found the complainant also stated a claim for nonpecuniary damages related to the emotional trauma he suffered when he was denied leave to be with his family after his wife gave birth to premature twin boys, one of whom later required emergency neonatal surgery. *Starr v. Department of Transportation*, 97 FEOR 1223, EEOC No. 01953151 (EEOC OFO 1997).
- "To avoid a potential Title VII violation, employers should carefully distinguish between pregnancy-related leave and other forms of leave, ensuring that any leave specifically provided to women alone is limited to the period that women are incapacitated by pregnancy and childbirth. [Footnote omitted.]" EEOC Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities.
- The agency discriminated against the complainant on the basis of sex in denying him a three-month paternity leave to care for his child while his wife returned to work. The agency's policy improperly allowed female employees a three month maternity leave without supporting documentation of incapacity while allowing male employees just two weeks and then only to care for minor children or the mother of the newborn if she is incapacitated for maternity reasons. *Cline v. U.S. Postal Service*, 94 FEOR 3144, EEOC No. 05920305 (EEOC 1993).
- The agency's policy of denying or limiting advanced sick leave for pregnant women was sex-based discrimination. *Ellis-Balone v. Department of Energy*, 105 LRP 871, EEOC No. 07A30125 (EEOC OFO 2004).

Wages

- "Part-time workers should receive proportionate wages and benefits compared with full-time workers. [Footnote omitted.] Similarly, part-time workers should receive proportionate credit for

relevant experience needed to qualify for promotions, training programs, or other employment opportunities." Employer Best Practices for Workers with Caregiving Responsibilities.

Associational discrimination

- "It is unlawful for a covered entity to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association." 29 CFR 1630.8.
- An employee states a viable claim when he alleges that he is being discriminated against because of his relationship with his learning disabled children. *Johnson v. Department of the Army*, 107 LRP 55061, EEOC No. 0120072415 (2007).
- The complainant stated a viable claim of disparate treatment based on his association with his disabled daughter when he alleged management changed five days of sick leave he used to care for his daughter to annual leave, even though he had approval for protection under the Family and Medical Leave Act. *Stoltz v. U.S. Postal Service*, 105 LRP 43177, EEOC No. 01A53899 (EEOC OFO 2005).
- The complainant stated a claim of associational discrimination in his allegation that he was subjected to disability discrimination when his insurance, which was part of the Federal Employee Health Benefits Program, denied coverage of his wife's bone marrow transplant. *Polifko v. Office of Personnel Management*, 95 FEOR 3113, EEOC No. 05940611 (EEOC 1995).
- The agency did not subject the complainant to disability discrimination when it denied his request for a shift change so he could care for his autistic son. People associated with an individual who has a disability are entitled to Rehabilitation Act protection against discrimination on the basis of that association. However, the law only prohibits disparate treatment based on the association. An agency is not required to provide reasonable accommodation for an employee or applicant for employment based on the disability of an associate. *Helena v. Department of Defense, Defense Logistics Agency*, 104 LRP 45781, EEOC No. 07A30108 (EEOC 2004).
- The complainant alleged he was discriminated against based on his association with a disabled person (his spouse) when the agency denied him a reasonable accommodation of a hardship transfer. The EEOC affirmed the agency's dismissal of the complaint for failure to state a claim, noting that individuals with a relationship or association with a person with a disability are not entitled to receive reasonable accommodations. *Lazer v. Department of Transportation*, 103 LRP 4288, EEOC No. 01A24474 (EEOC OFO 2003).

Hostile work environment

- "Employers should take steps to prevent harassment directed at caregivers or pregnant workers from occurring in the workplace and to promptly correct any such conduct that does occur. In turn, employees who are subjected to such harassment should follow the employer's harassment complaint process or otherwise notify the employer about the conduct, so that the employer can investigate the matter and take appropriate action." EEOC Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities.
- The complainant, a podiatric physician, was subjected to a hostile work environment because of her pregnancy and her prior EEO activity. Another doctor constantly made inappropriate and demeaning comments about her pregnancy, and threatened to terminate her because of her pregnancy. The doctor said the complainant could not get another residency because she "had too many kids and nobody wanted her as resident with all those kids." She was awarded $70,000 in nonpecuniary damages. *Crear v. Department of Veterans Affairs*, 106 LRP 5638, EEOC No. 07A50079 (EEOC OFO 2006).

Marital status

- The EEOC has no jurisdiction over discrimination claims based on marital status. *Kittrell v. Department of Veterans Affairs*, 110 LRP 12851, EEOC No. 0120093863 (EEOC OFO 2010).
- ***Hadley:*** The Commission has no jurisdiction over claims based on marital status. Nor does it have jurisdiction over claims based on having or not having children. *Hadley Guide to Federal Sector Equal Employment Law and Practice:* Marital Status.
- The complainant claimed that she was discriminated against because she was a single, divorced mother with children, who had to regularly exhaust her leave to take care of her kids. Although a claim that male caregivers were treated more favorably under similar circumstances would have been viable under Title VII, her claim of unequal treatment based on marital status was not. *Ramirez v. Social Security Administration*, 112 LRP 5250, EEOC No. 0120101227 (EEOC OFO 2012).

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Family and Medical Leave Act: Childbirth, Adoption, and Foster Care

FMLA Breakdown

The FMLA can be tricky to navigate, especially since it has two Titles that are regulated by two separate agencies.

Title I covers mostly private sector employees, but it also includes U.S. Postal Service workers, some civilian members of the Department of Defense, employees of the government of the District of Columbia, and individuals employed on a temporary appointment of one year or less or on an intermittent appointment. Title II covers just about all of the rest of the federal workforce.

Regulations for Title I are issued by the Department of Labor, while the Office of Personnel Management promulgates Title II regulations.

Employees covered by Title I and Title II are guaranteed FMLA protections for leave related to childbirth, adoption, and foster care.

Scheme	Covered workers
Title II	Covers most federal employees not specifically covered under the provisions set forth below.
Title I	USPS employees, employees of the government of the District of Columbia, and individuals employed on a temporary (one year or less) or intermittent appointment.
Agency Regulations	Nonappropriated Fund employees of the Coast Guard, DOD teachers, and Title 38 employees of the Department of Veterans Affairs are covered by regulations issued by their agency.
Congressional Accountability Act	This act extends FMLA protections to employees of Congress, the Capitol Police, and other congressional bodies. It is similar to Title I.
Presidential and Executive Office Accountability Act	This act extends the FMLA to the few thousand members of the Executive Office of the President, including the White House and National Security Council, and other such offices.

Overview

In a 2015 presidential memorandum, President Barack Obama directed executive departments and agencies to review policies with respect to family leave for childbirth, adoption, or foster care placement in the home. The memorandum was directed toward giving employees family leave and other workplace flexibilities following the birth, adoption, or placement of a child. With respect to the FMLA, the memo directed agencies to review their FMLA policies and consider going beyond what FMLA requires by allowing employees to take more paid leave or leave without pay than the FMLA provides. Presidential Memorandum -- Modernizing Federal Leave Policies (01/15/15).

Following this, OPM issued a handbook to provide additional guidance on the workplace flexibilities employees can use for these purposes, with directives on how to make the most of FMLA leave to achieve the goals of the presidential memo.

The basics

- The FMLA provides eligible employees, in any one-year period, with up to 12 weeks of unpaid leave for the birth, adoption, or foster care placement of a child. 5 USC 6382(a)(1)(A)-(D); 5 CFR 630.1203(a).
- Under the FMLA, federal employees are entitled to a total of up to 12 workweeks of unpaid leave during any 12-month period for one or more of these purposes related to childbirth:
    - The birth of a son or daughter of the employee and the care of such son or daughter.
    - The care of a spouse, son, or daughter, or mother of the employee who has a serious health condition.
    - A serious health condition that makes the employee unable to perform the essential functions of her position.

5 CFR 630.1203(a).

- The entitlement to leave for a birth or adoption of a son or daughter expires 12 months after the date of birth or adoption. 5 CFR 630.1203(a). 29 CFR 825.120(a)(2); 29 CFR 825.121(a)(2).
- Employees covered by Title II must have completed at least 12 months of service (not required to be 12 recent or consecutive months). Time served under a temporary appointment with a time limitation of one year or less or as an intermittent employee does not count toward the 12-month requirement. 5 USC 6381(1)(B), 5 CFR 630.1201(b).
- An employee covered by Title I must have completed at least 12 months of service as a covered federal employee in order to be entitled to FMLA leave. This 12 months does not have to be consecutive, and it does not have to be with the same agency. 29 USC 2611(4)(B); 29 CFR 825.108(a).
- Following the goals of the presidential memo, OPM has advised agencies that they may provide employees who are not technically eligible for FMLA leave with FMLA-like benefits for childbirth, adoption, and foster care purposes. OPM: Handbook on Leave and Workplace Flexibilities for Childbirth, Adoption, and Foster Care.
- An employee taking FMLA based on the expected birth of a child should provide no less than 30 calendar days' notice to the agency of her intention to take FMLA leave or as much notice as is practicable if the leave is to begin sooner. OPM: Handbook on Leave and Workplace Flexibilities for Childbirth, Adoption, and Foster Care.

Self-care

- The FMLA considers any period of incapacity due to pregnancy or childbirth or for prenatal care to be a serious health condition, regardless of whether the employee receives active medical

treatment from a health care provider or how long the period of incapacity lasts. OPM: Handbook on Leave and Workplace Flexibilities for Childbirth, Adoption, and Foster Care.

- Since sick leave and FMLA leave are two separate entitlements, an employee does not need to invoke FMLA to use sick leave for her period of recovery from childbirth. Instead, she can use six to eight weeks of sick leave, then later invoke FMLA to bond with her baby. OPM: Handbook on Leave and Workplace Flexibilities for Childbirth, Adoption, and Foster Care.

Caring for birth mother

- An employee may use FMLA leave to care for a wife, daughter (generally under 18 years of age), or mother for prenatal care or any period of incapacity due to pregnancy, childbirth, or recovery from child birth. OPM: Handbook on Leave and Workplace Flexibilities for Childbirth, Adoption, and Foster Care.
- In 2013, the U.S. Supreme Court ruled that the Defense of Marriage Act's definition of "marriage" as a legal union between one man and one woman was unconstitutional. *U.S. v. Windsor*, 113 LRP 26537, 133 S. Ct. 2675 (U.S. 2013). Under *Windsor*, same-sex spouses of federal employees have the same rights to benefits as opposite-sex spouses. FMLA Title II's definition of spouse had been tied to DOMA's definition of "marriage." OPM issued guidance indicating that it would revise its definition of "spouse" in its FMLA regulations to come in line with *Windsor*. Effective May 9, 2016, OPM revised the definition of spouse in its FMLA regulations to permit federal employees with same-sex spouses to use FMLA leave in the same manner as federal employees with opposite-sex spouses. 81 Fed. Reg. 20,523 (2016). For more details, see Quick Start Guide: Domestic Partners and Same-Sex Spouses.
- Despite the broadened definition of marriage indicated by *Windsor*, *Obergefell*, and OPM's revision, the definition of "spouse" for FMLA purposes is not as broad as the definition of a family member for sick leave and leave sharing purposes. Therefore, an employee cannot take FMLA leave to care for a domestic partner who gives birth to a child unless the domestic partner is a common law spouse. OPM: Handbook on Leave and Workplace Flexibilities for Childbirth, Adoption, and Foster Care; 81 FR 20523.

Caring for a newborn

- Each parent is entitled to use FMLA for the birth of a child and care of the newborn. OPM: Handbook on Leave and Workplace Flexibilities for Childbirth, Adoption, and Foster Care.
- An employee may elect to substitute annual leave or sick leave for any or all of the leave without pay used under the FMLA. OPM: Handbook on Leave and Workplace Flexibilities for Childbirth, Adoption, and Foster Care.

Caring for a daughter

- An employee may not invoke FMLA leave to care for a daughter over 18 years of age who has given birth unless she is incapable of self-care due to a mental or physical disability. OPM: Handbook on Leave and Workplace Flexibilities for Childbirth, Adoption, and Foster Care; 5 CFR 630.1202.
- Under the FMLA, "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: 1) under 18 years of age; or 2) 18 years of age or older and incapable of self-care because of a mental or physical disability. 5 CFR 630.1202.
- To use FMLA to care for a daughter for childbirth, adoption, or foster care purposes, the daughter must be incapable of self-care, meaning that she must require active assistance or supervision to provide daily self-care in three or more of the "activities of daily living" -- such as grooming, bathing, dressing, and eating -- or "instrumental activities of daily living" -- which include cooking, cleaning,

shopping, paying bills, using telephones, and taking public transportation. OPM: Handbook on Leave and Workplace Flexibilities for Childbirth, Adoption, and Foster Care.

- For FMLA purposes, a "physical or mental disability" is an impairment that, following the definitions of the ADA, substantially limits a major life activity under 29 CFR 1630.2(h), (i), and (j). 5 CFR 630.1202.

Intermittent leave

- FMLA leave may be taken intermittently due to a serious health condition if it is medically necessary. 5 CFR 630.1205(b).
- Intermittent FMLA leave for the purpose of caring for a new child is permissible if the employee and the agency agree to it. 5 CFR 630.1205(a).
- A reduced leave schedule is a special kind of intermittent leave that amounts to a change in an employee's usual number of working hours in a workweek or workday, in many cases reducing an employee's full-time schedule to a part-time schedule for the period of FMLA leave. OPM: Handbook on Leave and Workplace Flexibilities for Childbirth, Adoption, and Foster Care; 5 CFR 630.1202.
- An employee is entitled to take FMLA leave for her own or an eligible birth mother's prenatal appointments; for any period of incapacity due to pregnancy, childbirth, or recovery from childbirth; or to care for her child with a serious health condition. OPM: Handbook on Leave and Workplace Flexibilities for Childbirth, Adoption, and Foster Care.
- An employee may use FMLA leave intermittently or on a reduced leave schedule to bond with or care for her healthy baby, and OPM has encouraged agencies to approve requests for intermittent FMLA leave for bonding to the maximum extent possible. OPM: Handbook on Leave and Workplace Flexibilities for Childbirth, Adoption, and Foster Care.

Definition of 'parent'

- For Title II purposes, a "parent" may be a biological, adoptive, step, or foster father or mother, or any individual who stands or stood in loco parentis to an employee who is a son or daughter. This term does not include parents "in law." 81 Fed. Reg. 20,523 (2016).
- Individuals may be *in loco parentis* when they have day-to-day responsibility for the care and financial support of a child or did so when the employee was a child. A biological or legal relationship is not necessary to establish this relationship. 5 USC 6381(3); 5 USC 6381(6); 5 USC 6382(a)(1)(A)-(C); 5 CFR 630.1202.
- In 2010, OPM issued CPM 2010-15, in which it adopted the Department of Labor's Interpretation No. 2010-3 clarifying the definition of "son or daughter" as it applies to employees acting as a parent of a child, and explained that either day-to-day care ***or*** financial support may establish an *in loco parentis* relationship.
- In the interpretation, DOL notes that, "The regulations do not require an employee who intends to assume the responsibilities of a parent to establish that he or she provides both day-to-day care *and* financial support in order to be found to stand *in loco parentis* to a child." DOL Interpretation No. 2010-3.
- Any employee who will stand *in loco parentis* to a baby is considered a parent for FMLA purposes and is entitled to use FMLA leave to bond with or care for the child, even if the employee is not the child's biological parent. OPM: Handbook on Leave and Workplace Flexibilities for Childbirth, Adoption, and Foster Care.
- Thus, an employee whose same or opposite-sex domestic partner is having a child, but the employee is not the child's biological parent or a grandparent who will raise a child, is entitled to

use FMLA leave to bond with the child or to care for the child if the employee will stand *in loco parentis* to the child. OPM: Handbook on Leave and Workplace Flexibilities for Childbirth, Adoption, and Foster Care.

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Family and Medical Leave Act -- Title I

Which Title applies?

It is no secret that administering the Family and Medical Leave Act can be a tricky process, with its multiple schemes affecting different classes of employees.

How do you know which scheme applies? Almost all federal workers are covered by Title I or Title II. This Quick Start Guide covers Title I, which is for private sector workers and certain federal employees. These include U.S. Postal Service workers, some civilian members of the Department of Defense, employees of the government of the District of Columbia, and individuals employed on a temporary appointment of one year or less or on an intermittent appointment.

Title II, which applies to almost all other federal employees, is covered in Family and Medical Leave Act -- Title II.

Scheme	Covered workers
Title II	Covers most federal employees not specifically covered under the provisions set forth below.
Title I	USPS employees, employees of the government of the District of Columbia, and individuals employed on a temporary (one year or less) or intermittent appointment.
Agency Regulations	Nonappropriated Fund employees of the Coast Guard, DOD teachers, and Title 38 employees of the Department of Veterans Affairs are covered by regulations issued by their agency.
Congressional Accountability Act	This act extends FMLA protections to employees of Congress, the Capitol Police, and other congressional bodies. It is similar to Title I.
Presidential and Executive Office Accountability Act	This act extends the FMLA to the few thousand members of the Executive Office of the President, including the White House and National Security Council, and other such offices.

Overview

The FMLA was designed to address the impact of societal changes on the workforce, mindful of the needs of those who are dependent upon family members for support and care. Accordingly, the FMLA provides eligible employees, in any 12-month period, with up to 12 weeks of unpaid leave for the birth, adoption or foster care placement of a child, or due to the serious health condition of the employee or the employee's spouse, child, or parent. Employees taking FMLA leave may retain their benefits and seniority and return to their former positions, or to an equivalent one with the same terms and benefits, after the leave period.

The FMLA also provides for military family leave through two provisions. One provision covers "qualifying exigency leave," related to when a servicemember is called to active duty, and the other provision involves "servicemember caregiver leave" for employees who care for servicemembers who suffer illness or injury related to active duty. The FMLA's military-related provisions are covered in the Quick Start Guide: Family and Medical Leave Act -- Title I -- Military Family Leave and in the Quick Start Guide: Family and Medical Leave Act -- Title II -- Military Family Leave.

The FMLA has four schemes -- one for congressional employees, one for employees in the executive office of the president, one for the majority of the federal workforce (Title II), and one that applies to the private sector and to temporary, U.S. Postal Service, and certain other federal employees, as listed in the chart

above (Title I). This Quick Start Guide covers Title I, with implementing regulations published by the Department of Labor.

The basics

- Title I applies to certain federal employees, including USPS workers, employees of the government of the District of Columbia, and individuals employed on a temporary (one year or less) or intermittent appointment, and other employees not covered by Title II. 29 CFR 825.109(b).
- Nonappropriated Fund employees of the Coast Guard, DOD teachers, and Title 38 employees of the Department of Veterans Affairs are covered by agency regulations to mirror Department of Labor Title I regulations. 5 CFR 630.1201(b).
- In cases that do not involve care for a covered servicemember, Title I provides eligible employees, in any one-year period, with up to 12 weeks of unpaid leave for the birth, adoption, or foster care placement of a child or due to the serious health condition of the employee or the employee's spouse, child, or parent. 29 CFR 825.200(a).
- ***Broida:*** A serious health condition is defined as an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. *Broida Guide to MSPB Law:* Family Leave, *citing* 29 USC 2611(11).
- Title I employees who take FMLA leave have the right to retain their benefits and seniority and to return to their former position, or to an equivalent one with the same terms and benefits, after the leave period. 29 USC 2614(a).
- In all circumstances, 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 29 CFR 825.300. 29 CFR 825.127(e)(4).
- An employee may choose to substitute accrued paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for unpaid leave. 29 CFR 825.207(a).

Definitions

- *Historical note on same-sex spouses*: In 2013, the U.S. Supreme Court ruled that the Defense of Marriage Act's definition of "marriage" as a legal union between one man and one woman was unconstitutional. *U.S. v. Windsor*, 113 LRP 26537, 133 S. Ct. 2675 (U.S. 2013). Under *Windsor*, same-sex spouses of federal employees have the same rights to benefits as opposite-sex spouses. In FMLA Title I, "spouse" was defined as "a husband or wife, as the case may be." 29 USC 2611 (13). After *Windsor*, DOL issued regulations that define spouse as the other person with whom an individual entered into marriage as defined or recognized under state law. 29 CFR 825.102. For more details, see Quick Start Guide: Domestic Partners and Same-Sex Spouses.
- Under Title I regulations, "spouse" also includes an individual in a common law marriage, including a same-sex common law marriage, that was entered into in a state that recognizes such marriages or entered into in another country if it is valid in that country and could have been entered into in at least one state. 29 CFR 825.102.
- The FMLA's text refers to the son or daughter of employees. "Son" or "daughter" means a biological child, an adopted or foster child, a stepchild, a legal ward, or the child of a person who has taken on the role of parent, who is either younger than 18, or older than 18 and incapable of self-care because of a disability, according to 29 CFR 825.102.
- A "parent" may be a biological parent or an individual who stood (or stands) *in loco parentis* to the employee when the employee was a son or daughter as defined above. This term does not include parents-in-law. 29 CFR 825.102.
- An individual will be "incapable of self care" when the individual requires "active assistance or supervision to provide daily self-care in several of the 'activities of daily living' ... or 'instrumental activities of daily living.'" 29 CFR 825.102.

- Title I defines a "serious health condition" as 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." 29 USC 2611; 29 CFR 825.102.
- "Intermittent leave" is leave taken in separate blocks of time due to a single qualifying reason. 29 CFR 825.202.
- A "reduced leave schedule" is a leave schedule that reduces an employee's usual number of working hours per workweek or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time work. 29 CFR 825.202.

Eligibility

- To be eligible for FMLA leave under Title I, an employee must: 1) work for a covered employer; 2) have worked for the employer for 12 months; 3) have worked at least 1,250 hours in those 12 months; and 4) work where at least 50 employees are employed by the employer within 75 miles. 29 CFR 825.110; 29 CFR 825.111.
- The 12 months do not have to be consecutive, but employment prior to a continuous break in service of seven years or more need not be counted toward the time-in-service requirement. 29 CFR 825.110(b)(1). Exceptions exist if the break in service was due to military service obligations or if there is a written agreement regarding the agency's intention to rehire the employee after the break in service. 29 CFR 825.110(b)(2).
- The entire federal government qualifies as a "covered employer" for purposes of Title I. Private sector employers who employ 50 or more employees in 20 or more workweeks and who engage in commerce, including joint employers, are also covered. 29 CFR 825.104; 29 CFR 825.105; 29 CFR 825.109.
- Time in federal service is portable from agency to agency under Title I. Because Title I defines the entire federal government as a single employer, covered employees can use time spent at various agencies to count toward the work requirements. 29 USC 2611(4)(B); 29 CFR 825.108(a).
- Whether an employee has worked the minimum 1,250 hours of service is determined according to Fair Labor Standards Act principles for determining compensable hours of work. The determination isn't limited by recordkeeping methods or by compensation agreements that don't accurately reflect all of the hours that an employee has worked for the employer. 29 CFR 825.110(c).
- Any week or part of a week (including any periods of paid or unpaid leave) during which the employee is on the payroll counts as a week of employment. 29 CFR 825.110(b).
- For occasional or casual employment, 52 weeks is deemed to be equal to 12 months. 29 CFR 825.110(b).
- Employees are not entitled to more than 12 weeks of FMLA leave in a 12-month period even if they were not notified that their leave was being designated as FMLA leave. *Ragsdale v. Wolverine World Wide, Inc.*, 102 FMSR 90001, 535 U.S. 81 (U.S. 2002).
- The care that an employee must provide while on FMLA leave includes physical or psychological care, along with making arrangements for care. *Tellis v. Alaska Airlines, Inc.*, 105 LRP 33225, 414 F.3d 1045 (9th Cir. 2005).

Notice

- ***Broida:*** An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave and the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA or even mention the FMLA, however. *Broida Guide to MSPB Law:* Family Leave, *citing* 29 CFR 825.302(c).

- An employee's statement, "Depression again" is sufficient notice of the need for FMLA leave when the employer is already aware of the condition from previous incidents of leave. *Spangler v. Federal Home Loan Bank of Des Moines*, 22 NDLR 162, 278 F.3d 847 (8th Cir. 2002).
- Agencies may be on "constructive notice" of an employee's need for FMLA leave based on the employee exhibiting a drastic change in behavior. *Byrne v. Avon Products, Inc.*, 103 LRP 19224, 328 F.3d 379 (7th Cir. 2003).
- When an employer's FMLA policy does not specify the required form of a statement from a health care provider verifying an employee's need for medical leave, an employee may be able to show she was FMLA-eligible with evidence that she submitted a letter from her health care provider's office before taking leave. *Bellanger v. H & E Healthcare LLC d/b/a Flannery Oaks Guest House*, 112 LRP 47581 (M.D. La. 2012).
- Where the need for leave is not foreseeable, an employee must provide notice to the agency as soon as practicable under the facts and circumstances of the particular case. 29 CFR 825.303(a).
- The content of the notice an employee gives must contain sufficient information for an agency to reasonably determine whether the FMLA may apply to the leave request. 29 CFR 825.303(b). The "critical question" is whether the information imparted to the agency "is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition." *Walton v. Ford Motor Co.*, 105 LRP 48281, 424 F.3d 481 (6th Cir. 2005).

In loco parentis

- DOL issued Administrator's Interpretation No. 2010-3 clarifying the definition of son or daughter to cover those acting as a parent of a child. The DOL FMLA regulations specifically cover biological children and adopted children, as well as a foster child, stepchild, legal ward, or a child of a person standing *in loco parentis*.
- In the interpretation, DOL notes that the administrator has determined "the regulations do not require an employee who intends to assume the responsibilities of a parent to establish that he or she provides both day-to-day care *and* financial support in order to be found to stand *in loco parentis* to a child."

Age at disability's onset

- In Administrator's Interpretation No. 2013-1, DOL explained that the age of an employee's child at the onset of a disability is not relevant in determining a parent's entitlement to FMLA leave to care for an adult son or daughter.
- According to the interpretation, an employee will be able to take FMLA leave to care for an adult child, if the child: 1) has a disability as defined by the ADA; 2) is incapable of self-care due to that disability; 3) has a serious health condition; and 4) is in need of care due to the serious health condition, regardless of how old the child was when the disability commenced.

Remedies

- Title I employees can sue for civil monetary damages equivalent to "any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation." 29 CFR 825.400(c).
- ***Broida:*** While Title I and Title II employees under the FMLA are afforded equivalent rights to leave time, Title I expressly provides a private right of action to remedy employer action violating FMLA rights. *See* 29 USC 2617(a)(2). Title II contains no analogous provision. *Broida Guide to MSPB Law:* Family Medical Leave Act.
- Title I allows claimants to seek reasonable attorney's fees, reasonable expert witness fees, and other costs of the action. 29 CFR 825.400.
- In cases where wages or other compensation have not been denied or lost, claimants may seek "any actual monetary losses sustained as a direct result of the violation, such as the cost of

providing care, up to a sum equal to 12 weeks of wages or salary." Claimants may also seek interest on their damages. 29 USC 2617(a)(1)(A)(II).

- FMLA plaintiffs may seek reinstatement. 29 USC 2617(d)(2); *Harrell v. U.S. Postal Service*, 106 LRP 28603, 445 F.3d 913 (7th Cir. 2006).
- Title I employees who believe that their rights have been violated may file a complaint with the Department of Labor. 29 CFR 825.400(a)(1). However, there is no requirement to exhaust administrative remedies. 29 CFR 825.400(a)(1).
- Employees may voluntarily settle their FMLA claims without court or DOL approval. However, prospective waivers of FMLA rights are prohibited. 29 CFR 825.220(d).
- Generally, employees must bring an action within two years after the date of the last event constituting the alleged violation. 29 CFR 825.400(2)(b). However, when a willful violation is alleged, employees have three years to commence an action. 29 CFR 825.400(2)(b).
- ***Hadley:*** Although the EEOC does not have jurisdiction of complaints under the FMLA, an allegation that the complainant was not allowed to change sick leave to family leave due to discrimination states a claim within the EEO purview. *Hadley Guide to Federal Sector Employment Law and Practice:* Leave, *citing Dede v. U.S. Postal Service*, 99 FEOR 10074, EEOC No. 01975499 (EEOC OFO 1999).

Return to work

- Under the FMLA, eligible employees who take leave are entitled to be restored to their position or a position with equivalent benefits, pay, and other terms and conditions of employment. 29 USC 2614(a).
- In rare circumstances, "key employees" -- those salaried employees within the highest paid 10 percent of employees within 75 miles of the work site -- may not be restored to their positions after taking FMLA leave. This may occur if the actual restoration, rather than the FMLA absence itself, causes "substantial and grievous economic injury to operations." Key employees must be notified of this in advance and be given an opportunity to return to work from FMLA leave. 29 CFR 825.217; 29 CFR 825.218; 29 CFR 825.219.

Medical certification

- Agencies may require that a leave request be supported by a medical certification issued by the health care provider, which the employee must provide in a timely manner. 29 USC 2613(a).
- When the agency requests the certification, it generally must give the employee at least 15 calendar days to respond. It must also advise the employee of the consequences of the failure to provide the adequate certification. 29 CFR 825.305(b), (d).
- The employee must then provide the certification within the time frame requested by the agency, although an untimely certification will suffice when it is impracticable under the circumstances to return it by the deadline, "despite the employee's diligent, good faith efforts." 29 CFR 825.305(b).
- It is the employee's obligation to either provide a complete and sufficient certification or provide any necessary authorization for the health care provider to release a complete and sufficient certification directly to the agency. In cases where the medical certification is incomplete, the agency can deny FMLA leave. 29 CFR 825.305(d).
- If an employee submits insufficient certification from a medical provider, then only specific parties -- a health care provider, HR professional, leave administrator, or management official other than the employee's supervisor -- can contact the employee's health care provider for purposes of clarification and authentication. The employee's direct supervisor may not make the contact. 29 CFR 825.307(a).
- DOL has developed two optional forms, WH-380-E and WH-380-F for use in obtaining medical certification. WH-380-E is for use when the employee's need for leave is due to the employee's

own serious health condition, and WH-380-F is for use when the need is to care for a family member. 29 CFR 825.306(b).

- In *FMLA Forms and GINA Confidentiality and Disclosure Provisions*, 115 LRP 4126 (EEOC 12/10/14), the EEOC cautioned employers about using WH-380-E and WH-380-F, as the forms may cause employers unwittingly to violate GINA.

Relationship to ADA/Rehabilitation Act

- ***Hadley:*** A request for FMLA leave for a serious health condition may also constitute a request for reasonable accommodation and, when it does, the FMLA request is considered protected EEO activity. *Hadley Guide to Federal Sector Equal Employment Law and Practice:* Reasonable Accommodation and the Family and Medical Leave Act.

- ***Hadley:*** Because an employee may be an individual with a disability under the ADA and have a serious health condition under FMLA, the employee may actually be entitled to leave under both statutes. However, the leave is overlapping. The employee may be entitled to 12 weeks leave under FMLA and, if that is all the leave required by the employee, an agency fulfills its obligation under both statutes by granting FMLA leave. If the employee needs leave beyond the 12 weeks, the agency must then grant the leave if it would not impose an undue hardship on the agency. *Hadley Guide to Federal Sector Equal Employment Law and Practice:* Reasonable Accommodation and the Family and Medical Leave Act.

Interface with GINA

- The Genetic Information Nondiscrimination Act of 2008 prohibits employers from requesting or requiring "genetic information with respect to an employee or a family member of the employee." 42 USC Section 2000ff-1(b); 29 CFR 1635.8(a).

- However, there is a general exception that applies to employees requesting leave to care for a family member under the FMLA. GINA recognizes that such employees will be required to provide family medical history (for example, when completing the FMLA medical certification form). An agency that receives family medical history under these circumstances would not violate GINA. 42 USC Section 2000ff-1(b)(3); 29 CFR 1635.8(b)(3).

- There is also an exception pertaining to FMLA leave due the employee's own illness. The general prohibition against an agency requesting or requiring genetic information doesn't apply when the acquisition of genetic information is inadvertent. 29 CFR 1635.8(b)(1). The acquisition is considered inadvertent when the agency, in making a lawful request for medical information, directs the employee (or health care provider) not to provide genetic information. 29 CFR 1635.8(b)(1)(i)(A).

- The EEOC states that the agency's direction not to provide genetic information should include a statement that GINA prohibits employers from requesting or requiring genetic information of an individual or family member, except as specifically allowed by GINA, and that the agency is requesting that no genetic information be provided in the response to the request for medical information. 29 CFR 1635.8(b)(1)(i)(B).

- If an agency does not use such language in its request for medical information, it may still show that a particular receipt of genetic information was inadvertent if its request for medical information was not likely to result in obtaining genetic information, such as where an overly broad response is received in response to a tailored request for medical information. 29 CFR 1635.8(b)(1)(i)(C).

Leave abuse

- ***Broida:*** The appellant who abuses or misuses family leave is subject to adverse action. *Broida Guide to MSPB Law:* Abuse of Family Leave, *citing Jones v. U.S. Postal Service*, 106 LRP 57001, 103 MSPR 561 (MSPB 2006), *aff'd*, *Jones v. U.S. Postal Service*, 248 F. App'x 160 (Fed. Cir. 2007, *unpublished*).

- The FMLA has its own provisions for requesting or granting leave. Thus, AWOL charges and failure to follow leave procedures must be examined within the context of the FMLA. 29 USC 2612; 29 USC 2613; 29 CFR Part 825.
- If some of an appellant's absences are excused under the FMLA, but others are not, the MSPB will assess whether the agency's penalty is reasonable as to the unexcused absences. *Byers v. U.S. Postal Service*, 98 FMSR 5192, 78 MSPR 456 (1998).

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Family and Medical Leave Act -- Title I -- Military Family Leave

Title I or Title II?

When it comes to the Family and Medical Leave Act, the first question employers have to deal with is what part of the law applies to them.

Title I covers mostly private sector employees, but it also includes U.S. Postal Service workers, some civilian members of the Department of Defense, employees of the government of the District of Columbia, and individuals employed on a temporary appointment of one year or less or on an intermittent appointment. Title II covers just about all of the rest of the federal workforce.

Regulations for Title I are issued by the Department of Labor, while the Office of Personnel Management promulgates Title II regulations.

Despite the differences between Title I and Title II, both of these FMLA schemes give eligible employees the right to take military family leave for duty-related and medical reasons.

Scheme	Covered workers
Title II	Covers most federal employees not specifically covered under the provisions set forth below.
Title I	USPS employees, employees of the government of the District of Columbia, and individuals employed on a temporary (one year or less) or intermittent appointment.
Agency Regulations	Nonappropriated Fund employees of the Coast Guard, DOD teachers, and Title 38 employees of the Department of Veterans Affairs are covered by regulations issued by their agency.
Congressional Accountability Act	This act extends FMLA protections to employees of Congress, the Capitol Police, and other congressional bodies. It is similar to Title I.
Presidential and Executive Office Accountability Act	This act extends the FMLA to the few thousand members of the Executive Office of the President, including the White House and National Security Council, and other such offices.

Overview

In the National Defense Authorization Act for fiscal years 2008 and 2010, Congress made changes to Title I and Title II to expand FMLA rights and entitle eligible employees to take military family leave through two provisions. One provision covers "qualifying exigency leave," related to when a servicemember is called to

active duty, and the other provision involves "servicemember caregiver leave" for employees who care for servicemembers and veterans who suffer illness or injury related to active duty.

The basics

- Title I employees may take FMLA leave due for a "qualifying exigency" while the employee's spouse, son, daughter, or parent is on covered active duty or call to covered active duty status or has been notified of an impending call. 29 CFR 825.126(a).
- An eligible Title I employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember who suffers a serious injury or illness on active military duty is entitled to 26 weeks of leave during a single 12-month period to care for the servicemember. 29 CFR 825.127; 29 USC 2612(a)(3)-(4).
- In all circumstances, including for leave taken to care for a covered servicemember, 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 29 CFR 825.300 and 29 CFR 825.127(e)(4).
- Title I provides for leave to care for a veteran for up to five years after the veteran leaves military service. 29 USC 2611(15)(B). For covered veterans who were discharged before March 8, 2013, the period between Oct. 28, 2009, and March 8, 2013, does not count toward the determination of the five-year period. 29 CFR 825.127(b)(2)(i).
- An employer may require employees to document their family relationship to covered servicemembers or veterans. This documentation may take the form of a simple statement from the employee, a child's birth certificate, a court document, or something similar. 29 CFR 825.122(k).

Definitions

- The Title I definition of "serious injury or illness" as it pertains to servicemember caregiver leave includes a condition that may have been incurred in the line of duty or may have existed before the military service but was aggravated by that service. The condition need not have manifested itself during military service, but instead the condition could appear or develop after the end of military service. 29 USC 2611(18); 29 CFR 825.127(c).
- In the case of a member of the regular armed forces, "covered active duty or call to covered active duty status" means duty during the deployment of the member with the armed forces to a foreign country. 29 CFR 825.126(a)(1).
- In the case of a member of the Reserves, "covered active duty or call to covered active status" means duty during the deployment of the member with the armed forces to a foreign country under a federal call or order to active duty in support of a contingency operation pursuant to the applicable sections of Title 10 of the U.S. Code. 29 CFR 825.126(a)(2).
- "Covered active duty" does not include state calls to active duty unless they are under order of the President pursuant to the provisions indicated in 29 CFR 825.126(a)(2). 29 CFR 825.126(a)(4).
- Under FMLA Title I, a "covered servicemember" is: 1) a current member of the armed forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness; or 2) a covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness. 29 CFR 825.102; 29 CFR 825.122(a)(1).
- A "covered veteran" for Title I purposes is an individual who was a member of the armed forces and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. 29 CFR 825.102.

- A "qualifying exigency" is defined as short-notice deployment, military events and related activities, child care and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities, parental activities, and additional activities where agency and employee agree to the leave. 29 CFR 825.126(b)(1)-(9).
- "Next of kin of a covered servicemember" means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter. 29 CFR 825.102; 29 CFR 825.122(e).

Amount of leave time

- When an eligible employee takes FMLA leave to care for a servicemember, the single 12-month period begins on the first day the eligible employee takes FMLA leave to care for a covered servicemember and ends 12 months after that date. 29 CFR 825.127(e)(1).
- This leave is applied on a per-covered-servicemember, per-injury basis, so an eligible employee may be entitled to take more than one period of 26 weeks of leave if the leave is to care for different covered servicemembers or to care for the same servicemember with a subsequent serious injury or illness. However, no more than 26 weeks of leave may be taken within any single 12-month period. 29 CFR 825.127(e)(2).
- An eligible employee may take more than one period of 26 weeks of leave to care for a covered servicemember with more than one serious injury or illness only when the serious injury or illness is a subsequent serious injury or illness. When an eligible employee takes leave to care for more than one covered servicemember or for a subsequent serious injury or illness of the same covered servicemember, 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 weeks of leave in each single 12-month period. 29 CFR 825.127(e)(2).
- If an eligible employee takes FMLA leave under the general provisions, which limit leave for qualifying reasons to 12 weeks, and also takes servicemember-related leave, the employee is limited to 26 weeks in a single 12-month period and to 12 weeks for nonservicemember-related reasons. For example, an eligible employee may, during the single 12-month period, take 16 weeks of FMLA leave to care for a covered servicemember 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 servicemember. 29 CFR 825.127(e)(3).
- Spouses who are eligible for FMLA leave and are employed by the same covered employer may be limited to a total of 26 workweeks of servicemember-related leave if it is related to the birth of the employee's child, adoption or foster care issues, to care for the employee's parent, or to care for a covered servicemember. 29 CFR 825.127(f).

Certification

- The first time an employee requests leave because of a qualifying exigency arising out of the covered active duty or call to covered active duty status of a military member, the employer may require the employee to provide a copy of the military member's active duty orders or other documentation issued by the military. This information only needs to be provided once, but an employer can request certification again if the qualifying exigency arises out of a different covered active duty. 29 CFR 825.309(a).
- Employers may require certification from employees that contains:
    - A statement signed by the employee of the appropriate facts regarding the qualifying exigency.
    - The approximate date on which the qualifying exigency commenced or will commence.

- The beginning and end dates for a continuous absence or the frequency and duration of intermittent absences.
- Appropriate contact information for third parties involved when the qualifying exigency involves meeting with a third party.
- A copy of the military member's rest and recuperation orders and the dates of the military member's rest and recuperation leave, if the qualifying exigency involves rest and recuperation leave. 29 CFR 825.309(b)(1)-(6).

- DOL has developed an optional form, WH-384, for employees' use in obtaining a certification that meets FMLA requirements. 29 CFR 825.309(c).
- When leave is taken to care for a covered servicemember with a serious injury or illness, an employer may require an employee to obtain a certification completed by an authorized health care provider of the servicemember. 29 CFR 825.310(a).
- Certification for a covered servicemember may be completed by: 1) a Department of Defense health care provider; 2) a Department of Veterans Affairs health care provider; 3) a DOD TRICARE-network-authorized private health care provider; 4) a DOD non-network TRICARE-authorized private health care provider; or 5) any health care provider as defined in 29 CFR 825.124. 29 CFR 825.310(a)(1)-(5).
- When an employee provides certification from a health care provider that is not a DOD, VA, or TRICARE-authorized provider, the employer may seek second and third opinions. 29 CFR 825.310(d).
- DOL has developed optional form WH-385 for employees' use in obtaining FMLA certification for leave to care for servicemembers and optional form WH-385-V to obtain certification to care for veterans. 29 CFR 825.310.

Intermittent leave

- FMLA leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a covered servicemember's serious injury or illness. It may also be taken to provide care or psychological comfort to a covered servicemember with a serious injury or illness. 29 CFR 825.202(b); 29 CFR 825.203.
- An employee's intermittent leave or a reduced leave schedule to care for a covered servicemember includes not only a situation where the servicemember's condition is intermittent, but it also covers where the employee is only needed intermittently. 29 CFR 825.124(c).

In loco parentis

- In the preamble to DOL's military family leave regulations, it explained that the fact that an employee may stand *in loco parentis* to a child of a military member is not sufficient to satisfy the statutorily required relationship with the military member for qualifying exigency leave. 78 Fed. Reg. 8,845 (02/06/13).
- However, DOL also explained that an eligible employee may take qualifying exigency leave to care for the parent of a military member, or someone who stood *in loco parentis* to the military member, when the parent is incapable of self-care and the need for leave arises out of the military member's covered active duty or call to covered active duty status. 78 Fed. Reg. 8,845 (02/06/13).

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Family and Medical Leave Act -- Title II

Which Title Applies?

It is no secret that administering the Family and Medical Leave Act can be a tricky process, with its multiple schemes affecting different classes of employees.

How do you know which scheme applies? Almost all federal workers are covered by Title I or Title II. This Quick Start Guide covers Title II, which applies to the bulk of the federal workforce.

Title I, which applies to private sector workers and to certain federal employees noted in the chart below, is covered in Family and Medical Leave Act -- Title I.

Scheme	Covered workers
Title II	Covers most federal employees not specifically covered under the provisions set forth below.
Title I	USPS employees, employees of the government of the District of Columbia, and individuals employed on a temporary (one year or less) or intermittent appointment.
Agency Regulations	Nonappropriated Fund employees of the Coast Guard, DOD teachers, and Title 38 employees of the Department of Veterans Affairs are covered by regulations issued by their agency.
Congressional Accountability Act	This act extends FMLA protections to employees of Congress, the Capitol Police, and other congressional bodies. It is similar to Title I.
Presidential and Executive Office Accountability Act	This act extends the FMLA to the few thousand members of the Executive Office of the President, including the White House and National Security Council, and other such offices.

Overview

The FMLA was designed to address the impact of societal changes on the workforce, mindful of the needs of those who are dependent upon family members for support and care. Accordingly, the FMLA provides eligible employees, in any 12-month period, with up to 12 weeks of unpaid leave for the birth, adoption, or foster care placement of a child or due to the serious health condition of the employee or the employee's spouse, child, or parent. Employees taking FMLA leave may retain their benefits and seniority and return to their former positions, or to an equivalent one with the same terms and benefits, after the leave period.

The FMLA also provides for military family leave through two provisions. One provision covers "qualifying exigency leave," related to when a servicemember is called to active duty, and the other provision involves "servicemember caregiver leave" for employees who care for servicemembers who suffer illness or injury related to active duty. The FMLA's military-related provisions are covered in the Quick Start Guide: Family and Medical Leave Act -- Title I -- Military Family Leave and in the Quick Start Guide: Family and Medical Leave Act -- Title II -- Military Family Leave.

The FMLA has four schemes -- one for congressional employees, one for employees in the Executive Office of the President, one for the majority of the federal workforce (Title II), and one that applies to the private sector and to temporary, U.S. Postal Service, and certain other federal employees, as listed in the chart above (Title I). This Quick Start Guide covers Title II, with implementing regulations published by the Office of Personnel Management.

The basics

- Title II provides eligible employees, in any one-year period, with up to 12 weeks of unpaid leave for the birth, adoption, or foster care placement of a child or due to the serious health condition of the employee or the employee's spouse, child, or parent. 5 USC 6382(a)(1)(A)-(D); 5 CFR 630.1203(a).

- ***Broida:*** The 12-month period for taking 12 weeks of FMLA leave starts on the first day FMLA leave is taken. A new FMLA leave year starts a year later. *Broida Guide to MSPB Law:* Family Leave, *citing Brantley v. Department of the Treasury*, 108 LRP 58501 (Fed. Cir. 2008, *unpublished*).
- Upon return from FMLA leave, an employee must be restored to the original job, or to an equivalent job with equivalent pay, benefits, and other terms. 5 USC 6384(a); 5 CFR 630.1210.
- Employees who take FMLA leave are treated as if they had not left the workplace as far as benefits are concerned. Employees do not accrue additional benefits during such absence, however. Employers are required to maintain health insurance coverage for an insured employee on FMLA leave. Nothing in the FMLA will diminish the obligation to comply with any collective bargaining agreement or employment benefit program that provides greater family or medical leave rights to employees. 5 USC 6384(b)-(c); 5 USC 6386; 5 CFR 630.1210(b)(4); 5 CFR 630.1210(d)(1); 5 CFR 630.1211; 5 CFR 630.1212(a).
- ***Broida:*** Nothing in the FMLA regulations requires that agencies must grant 480 hours of FMLA leave for a 12-month period every time an employee applies for it. *Broida Guide to MSPB Law:* Family Leave, *citing Wiens v. Department of the Treasury,* 106 LRP 21743 (Fed. Cir. 2006, *unpublished).*
- Agencies need to maintain records related to FMLA use that include the employee's name, rate of basic pay, number of hours of FMLA leave, and number of hours of substitute leave. 5 CFR 630.1213.

Definitions

- "Family member" refers only to parent, spouse, son, and daughter. 5 USC 6382(a)(1)(C).
- For Title II purposes, a "parent" may be a biological, adoptive, step, or foster father or mother, or any individual who stands or stood in loco parentis to an employee who is a son or daughter. This term does not include parents "in law." 5 CFR 630.1202.
- For Title II purposes, "spouse" means a husband or wife. "Husband or wife" refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the state where the marriage was entered into or, in the case of a marriage entered into outside of any state, if the marriage is valid in the place where entered into and could have been entered into in at least one state. 5 CFR 630.1202.
    - This definition includes an individual in a same-sex or common law marriage that either was entered into in a state that recognizes same-sex or common law marriages or, if entered into outside of any state, is valid in the place where entered into and could have been entered into in at least one state. 5 CFR 630.1202.
    - *Historical note on same-sex spouses*: In 2013, the U.S. Supreme Court ruled that the Defense of Marriage Act's definition of "marriage" as a legal union between one man and one woman was unconstitutional. *U.S. v. Windsor*, 113 LRP 26537, 133 S. Ct. 2675 (U.S. 2013). Under *Windsor*, same-sex spouses of federal employees have the same rights to benefits as opposite-sex spouses. FMLA Title II's definition of "spouse" had been tied to DOMA's definition of "marriage." OPM issued guidance indicating that it would revise its definition of spouse in its FMLA regulations to come in line with *Windsor*. Effective May 9, 2016, OPM revised the definition of spouse in its FMLA regulations to permit federal employees with same-sex spouses to use FMLA leave in the same manner as federal employees with opposite-sex spouses. 81 Fed. Reg. 20,523 (2016). For more details, see Quick Start Guide: Domestic Partners and Same-Sex Spouses.
- "Serious health condition" means an illness, injury, impairment, or physical or mental condition that involves: 1) inpatient care in a hospital, hospice, or residential medical care facility; or 2) continuing treatment by a health care provider. 5 USC 6381(5). *See also* 5 CFR 630.1202.

- "Intermittent leave" means leave taken in separate blocks of time, rather than for one continuous period of time, and may include leave periods of one hour to several weeks. Leave may be taken for a period of less than one hour if agency policy provides for a minimum charge for leave of less than one hour under 5 CFR 630.206(a). 5 CFR 630.1202.
- Under Title II, reduced schedule leave is a work schedule under which the usual number of hours of regularly scheduled work per workday or workweek of an employee is reduced. 5 CFR 630.1202.
- For Title II purposes, "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: 1) Under 18 years of age; or 2) 18 years of age or older and incapable of self-care because of a mental or physical disability. 5 CFR 630.1202.

Eligibility

- To be eligible for FMLA leave under Title II, an employee must have worked as a civil servant for 12 months. 5 CFR 630.1201(b)(1).
- Time served outside the civil service (such as at the Postal Service) and time spent as an intermittent employee does not count toward the requisite 12 months. 5 CFR 630.1201 (b)(2).
- Federal holidays during the period when an employee uses FMLA leave will not count toward the entitlement. 5 CFR 630.1203(e).
- Any nonwork days, such as furlough days, established by federal statute, executive order, or administrative order that occur during the period in which the employee is on FMLA leave may not be counted toward the 12-week entitlement to family and medical leave. 5 CFR 630.1203(e).
- Part-time employees are entitled to prorated FMLA leave. Federal temporary employees must have an appointment with a time limitation beyond one year and meet other employee eligibility requirements in order to receive FMLA leave under Title II. 5 CFR 630.1203(e).

Notice of FMLA entitlements and responsibilities

- Each agency shall inform its employees of their entitlements and responsibilities under the FMLA, including the requirements and obligations of employees. 5 CFR 630.1203(g).
- To meet the requirement of 5 CFR 630.1203(g), agencies may wish to provide employees access to the FMLA and OPM's implementing regulations or agency policies or guidance on implementing the FMLA. 61 Fed. Reg. 64,441 (1996).
- Agencies also may provide employees access to OPM Fact Sheet: Family and Medical Leave. 61 Fed. Reg. 64,441 (1996).
- The Navy complied with 5 CFR 630.1203(g) by notifying employees of their FMLA entitlements and responsibilities in its command leave policy. *Bowen v. Department of the Navy*, 109 LRP 69216, 112 MSPR 607 (MSPB 2009).
- The Treasury Department complied with 5 CFR 630.1203(g) when an employee's supervisor informed her that she would need to provide a doctor's note in order to be recertified at the end of the 200-hour period of FMLA leave for which she had been approved. *Wiens v. Department of the Treasury*, 106 LRP 21743 (Fed. Cir. 2006, *nonprecedential*).

Invoking FMLA entitlement

- Title II employees must invoke the FMLA in requesting leave. 5 CFR 630.1203(b).
- If the need for leave is not foreseeable, such as a medical emergency or due to the unexpected availability of a child for adoption or foster care, and the employee cannot provide 30 calendar days'

notice of the need for leave, the employee must provide notice within a reasonable period of time appropriate to the circumstances involved. 5 CFR 630.1207(d).

- If the need for leave is foreseeable, and the employee fails to give 30 calendar days notice with no reasonable excuse for the delay of notification, the agency may delay the taking of leave until at least 30 calendar days after the date that the employee provides notice of the need for FMLA leave. 5 CFR 630.1207(e).
- The required notice periods for the various FMLA leave situations can be found in the FMLA Title II Leave Notice Requirements chart.
- An employee may not retroactively invoke his entitlement to FMLA leave. However, if an employee and his personal representative are physically or mentally incapable of invoking the employee's entitlement to FMLA leave during the entire period in which the employee is absent from work, the employee may retroactively invoke entitlement to FMLA leave within two workdays after returning to work. 5 CFR 630.1203(b).
- ***Broida:*** An agency may waive the notice requirements under 5 CFR 630.1206(a) and instead impose the agency's usual and customary policies or procedures for providing notification of leave, but such notification policies or procedures must not be more stringent than the requirements set forth in 5 CFR 630.1206. *Broida Guide to MSPB Law:* Burden of Proof Under FMLA; FMLA Requests; Medical Documentation, *citing* 5 CFR 630.1206(b).

In loco parentis

- The term *in loco parentis* describes two situations in regard to FMLA leave: 1) an employee has day-to-day responsibility for the care and financial support of a child; or 2) an individual had such responsibility for an employee when the employee was a child. A biological or legal relationship is not necessary to establish this relationship. 5 USC 6381(3); 5 USC 6381(6); 5 USC 6382(a)(1)(A)-(C); 5 CFR 630.1202.
- In 2010, OPM issued CPM 2010-15,in which it adopted the Department of Labor's Interpretation No. 2010-3 clarifying the definition of "son or daughter" as it applies to employees acting as a parent of a child, and explained that either day-to-day care ***or*** financial support may establish an *in loco parentis* relationship.
- In the interpretation, DOL notes that "the regulations do not require an employee who intends to assume the responsibilities of a parent to establish that he or she provides both day-to-day care *and* financial support in order to be found to stand *in loco parentis* to a child." DOL Interpretation No. 2010-3.

Intermittent leave

- FMLA leave may be taken intermittently due to a serious health condition if it is medically necessary. 5 CFR 630.1205(b).
- Intermittent FMLA leave for new-child purposes is permissible if the employee and the agency agree to it. 5 CFR 630.1205(a).
- If an employee takes leave to care for a family member with a serious health condition or for her own serious health condition that makes her unable to perform any of the essential functions of her position, she may take leave intermittently or on a reduced leave schedule that is foreseeable based on planned medical treatment or recovery from a serious health condition. 5 CFR 630.1205(c); 5 CFR 630.1203(a)(3) and (4).
- If the employee is taking leave intermittently or on a reduced leave schedule for her own or a family member's serious health condition, her agency may place her temporarily in an available alternative

position for which she is qualified and that can better accommodate recurring periods of leave. 5 CFR 630.1205(c); 5 CFR 630.1203(a)(3) and (4).

- Upon returning from leave, the employee is entitled to be returned to her permanent position or an equivalent position, as provided in 5 CFR 630.1210(a). 5 CFR 630.1205(c); 5 CFR 630.1203(a)(3) and (4).
- The alternative position does not have to have equivalent duties, but must be in the same commuting area and must provide: 1) an equivalent grade or pay level; 2) the same type of appointment, work schedule, status, and tenure; and 3) the same employment benefits made available to the employee in her previous position. 5 CFR 630.1205(d).

Leave stacking

- Employees may use sick leave (or annual leave) for purposes that would qualify for FMLA leave, and then take their FMLA entitlement as unpaid leave. This is known as "leave stacking."
- If an employee requests sick leave for a purpose that may qualify under the FMLA, this request should be provisionally treated as an FLMA request. *Ellshoff v. Department of the Interior*, 97 FMSR 5348, 76 MSPR 54 (MSPB 1997).
- However, under Title II, employees cannot be forced to take FMLA leave, since under 5 USC 6382 (d), the substitution of paid leave for unpaid FMLA leave is at the employee's election.

Remedies

- There is no right to sue to enforce FMLA rights under Title II. *See, e.g., Russell v. Department of the Army*, 99 FEOR 90110, 191 F.3d 1016 (9th Cir. 1999); *Burg v. Department of Health and Human Services*, 110 LRP 43802 (3d Cir. 2010). An employee may file an internal grievance.
- ***Broida:*** If an adverse action is predicated on the agency's erroneous interference with an employee's rights under the FMLA, such adverse action is in violation of law, and it may not be sustained. 5 USC 7701(c)(2)(c). *Broida Guide to MSPB Law:* Family Leave, *citing* 5 USC 7701(c)(2)(C).
- ***Broida:*** While Title I and Title II employees under the FMLA are afforded equivalent rights to leave time, Title I expressly provides a private right of action to remedy employer action violating FMLA rights. *See* 29 USC 2617(a)(2). Title II contains no analogous provision. *Broida Guide to MSPB Law:* Family Medical Leave Act.
- In order for the Merit Systems Protection Board to consider an alleged violation of the FMLA, the employee must have an appealable adverse action that involves FMLA entitlements. Such an action may not always be immediately obvious. For example, if an employee submits a resignation and leave regulations are simultaneously violated, the resignation may be coercive. *Schultz v. Department of the Navy*, 87 FMSR 7005, 810 F.2d 1133 (Fed. Cir. 1987).
- ***Hadley:*** Although the EEOC does not have jurisdiction of complaints under the FMLA, an allegation that the complainant was not allowed to change sick leave to family leave due to discrimination states a claim within the EEO purview. *Hadley Guide to Federal Sector Employment Law and Practice:* Leave, *citing Dede v. U.S. Postal Service*, 99 FEOR 10074, EEOC No. 01975499 (EEOC OFO 1999).

Medical certification

- The FMLA provides that an agency may require that a request for leave be supported by certification issued by the health care provider. 5 USC 6383(a).
- If an agency requires certification, it will be considered sufficient under the FMLA if it states:
    - The date on which the serious health condition commenced.

- The probable duration of the condition.
- The appropriate medical facts within the knowledge of the health care provider regarding the condition.
- A statement that the employee is needed to care for the spouse, child, or parent in question and an estimate of the amount of time the employee is needed to care for the individual if leave for family care is involved.
- A statement that the employee is unable to perform the functions of the position if leave for self-care is involved.
- Dates for and the duration of medical treatment if the leave involves a reduced schedule or intermittent leave. 5 USC 6383(b).

- If the agency requests medical certification, an employee must provide the written medical certification required, signed by the health care provider, no later than 15 calendar days after the date of request. 5 CFR 630.1208(h).
- If it is not practical to provide medical certification within 15 calendar days after the date requested by the agency, despite the employee's diligent, good-faith efforts, the employee will have up to 30 calendar days to have medical certification submitted. 5 CFR 630.1208(h).
- If an agency doubts the validity of medical records, it can require a second and third (and final) opinion at the agency's expense. 5 USC 6383.
- The FLRA set aside as contrary to law an arbitration award ruling that the grievant's medical documentation was sufficient to support FMLA leave. The certification's general statement that the grievant was unable to work due to illness didn't meet the act's requirements. *Department of Agriculture, FSIS*, 109 LRP 44857, 63 FLRA 559 (FLRA 2009).
- In reviewing an absence where FMLA is involved, the MSPB will consider whether the employee submitted timely and substantively sufficient written medical certification under the circumstances. *Marshall v. Department of Veterans Affairs*, 115 LRP 7693 (MSPB 2015, *nonprecedential*), *citing Ellshoff v. Department of the Interior*, 97 FMSR 5348, 76 MSPR 54 (MSPB 1997).

Relationship to ADA/Rehabilitation Act

- ***Hadley:*** A request for FMLA leave for a serious health condition may also constitute a request for reasonable accommodation and, when it does, the FMLA request is considered protected EEO activity. *Hadley Guide to Federal Sector Equal Employment Law and Practice:* Reasonable Accommodation and the Family and Medical Leave Act.
- ***Hadley:*** Because an employee may be an individual with a disability under the ADA and have a serious health condition under FMLA, the employee may actually be entitled to leave under both statutes. However, the leave is overlapping. The employee may be entitled to 12 weeks leave under FMLA and, if that is all the leave required by the employee, an agency fulfills its obligation under both statutes by granting FMLA leave. If the employee needs leave beyond the 12 weeks, the agency must then grant the leave if it would not impose an undue hardship on the agency. *Hadley Guide to Federal Sector Equal Employment Law and Practice:* Reasonable Accommodation and the Family and Medical Leave Act.

Interface with GINA

- The Genetic Information Nondiscrimination Act of 2008 prohibits employers from requesting or requiring "genetic information with respect to an employee or a family member of the employee." 42 USC Section 2000ff-1(b); 29 CFR 1635.8(a).
- However, there is a general exception that applies to employees requesting leave to care for a family member under the FMLA. GINA recognizes that such employees will be required to provide

family medical history (for example, when completing the FMLA medical certification form). An agency that receives family medical history under these circumstances would not violate GINA. 42 USC Section 2000ff-1(b)(3); 29 CFR 1635.8(b)(3).

- There is also an exception pertaining to FMLA leave due the employee's own illness. The general prohibition against an agency requesting or requiring genetic information doesn't apply when the acquisition of genetic information is inadvertent. 29 CFR 1635.8(b)(1). The acquisition is considered inadvertent when the agency, in making a lawful request for medical information, directs the employee (or health care provider) not to provide genetic information. 29 CFR 1635.8(b)(1)(i)(A).
- The EEOC states that the agency's direction not to provide genetic information should include a statement that GINA prohibits employers from requesting or requiring genetic information of an individual or family member, except as specifically allowed by GINA, and that the agency is requesting that no genetic information be provided in the response to the request for medical information. 29 CFR 1635.8(b)(1)(i)(B).
- If an agency does not use such language in its request for medical information, it may still show that a particular receipt of genetic information was inadvertent if its request for medical information was not likely to result in obtaining genetic information, such as where an overly broad response is received in response to a tailored request for medical information. 29 CFR 1635.8(b)(1)(i)(C).

Leave abuse

- The FMLA has its own provisions for requesting or granting leave. Thus, absence without leave charges and failure to follow leave procedures must be examined within the context of the FMLA. 5 CFR 630.1206.
- Although an agency may apply its own procedures to leave requests under the FMLA, it may not apply a more restrictive policy than that provided under the FMLA and may not deny the employee leave for failure to follow agency procedures. *Kone v. Department of the Navy*, 115 LRP 8752 (MSPB 2015, *nonprecedential*), *citing* 5 USC 6383; *Burge v. Department of the Air Force*, 99 FMSR 5178, 82 MSPR 75 (MSPB 1999); 5 CFR 1206(e).
- It is improper to consider FMLA absences as a part of the equation when evaluating whether an employee has taken excessive leave. *McCauley v. Department of the Interior*, 111 LRP 40256, 116 MSPR 484 (MSPB 2011); *Savage v. Department of the Army*, 115 LRP 41854, 122 MSPR 612 (MSPB 2015); *Bair v. Department of Defense*, 112 LRP 8214, 117 MSPR 374 (MSPB 2012).
- Use of leave under the FMLA does not preclude an agency from charging excessive absence when the absence in question exceeds the 12-week statutory period of absence covered by the FMLA. *Cole, Administrator of the Estate of Pickering v. Department of Veterans Affairs*, 98 FMSR 5031, 77 MSPR 434 (MSPB 1998).
- An agency's approval of an employee's FMLA leave time doesn't prevent it from proving a charge of failure to follow proper leave procedures during the same time period. *Somuk v. Department of the Navy*, 111 LRP 64185, 117 MSPR 18 (MSPB 2011).

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Family and Medical Leave Act -- Title II -- Military Family Leave

Title I or Title II?

When it comes to the FMLA, the first question employers have to deal with is what part of the law applies to them.

Title I covers mostly private sector employees, but it also includes U.S. Postal Service workers, some civilian members of the Department of Defense, employees of the government of the District of Columbia, and individuals employed on a temporary appointment of one year or less or on an intermittent appointment. Title II covers just about all of the rest of the federal workforce.

Regulations for Title I are issued by the Department of Labor, while the Office of Personnel Management promulgates Title II regulations.

Despite the differences between Title I and Title II, both of these FMLA schemes give eligible employees the right to take military family leave for duty-related and medical reasons.

Scheme	Covered workers
Title II	Covers most federal employees not specifically covered under the provisions set forth below.
Title I	USPS employees, employees of the government of the District of Columbia, and individuals employed on a temporary (one year or less) or intermittent appointment.
Agency Regulations	Nonappropriated Fund employees of the Coast Guard, DOD teachers, and Title 38 employees of the Department of Veterans Affairs are covered by regulations issued by their agency.
Congressional Accountability Act	This act extends FMLA protections to employees of Congress, the Capitol Police, and other congressional bodies. It is similar to Title I.
Presidential and Executive Office Accountability Act	This act extends the FMLA to the few thousand members of the Executive Office of the President, including the White House and National Security Council, and other such offices.

Overview

In the National Defense Authorization Act for fiscal years 2008 and 2010, Congress made changes to Title I and Title II to expand FMLA rights and entitle eligible employees to take military family leave through two provisions. One provision covers "qualifying exigency leave," related to when a servicemember is called to active duty, and the other provision involves "servicemember caregiver leave" for employees who care for servicemembers and veterans who suffer illness or injury related to active duty.

The basics

- Title II employees are allowed to take FMLA leave due to any 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. 5 USC 6382(a)(1)(E).
- An eligible employee may take FMLA leave while the employee's spouse, son, daughter, or parent is on covered active duty or call to covered active duty status for one or more of the following qualifying exigencies: 1) short-notice deployment; 2) military events and related activities; 3) child care and school activities; 4) financial and legal arrangements; 5) counseling; 6) rest and recuperation; 7) post-deployment activities; 8) additional activities that arise out of the covered military member's covered active duty status or call to covered active duty status, provided that the agency and employee agree that the leave is an exigency. 5 CFR 630.1204.
- An employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember is entitled to a total of 26 administrative workweeks of leave during a 12-month period to care for the servicemember. This leave is only available during a single 12-month period. 5 USC 6382(a)(3).
- Title II provides for leave for an eligible employee to care for a veteran for up to five years after the veteran leaves military service. 5 USC 6381(8)(B).

Definitions

- Under Title II, "covered active duty or call to covered active duty status" means:
    - In the case of a member of the regular armed forces, duty during the deployment of the member with the armed forces to a foreign country under a call or order to active duty or a notification of an impending call or order.
    - In the case of a member of the Reserves, duty during the deployment of the member with the armed forces to a foreign country under a call or order to active duty or a notification of an impending call or order in support of a contingency operation pursuant to the relevant sections of Title 10 of the U.S. Code. 5 CFR 630.1202.
- Title II defines "covered military member" as the employee's spouse, son, daughter, or parent on covered active duty or call to covered active duty status. 5 CFR 630.1202.
- "Son or daughter on covered active duty or call to covered active duty status" refers to 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 covered active duty or call to covered active duty status. The son or daughter can be any age. 5 CFR 630.1202.
- For Title II purposes, "covered servicemember" means:
    - A member of the armed forces (including a member of the National Guard or Reserves) who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.
    - A veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of five years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy. 5 USC 6381(8).
- As it relates to servicemembers, "serious injury or illness" means an injury or illness that was incurred or aggravated by the member in the line of duty on active duty in the armed forces and that renders the member medically unfit to perform the duties of the member's office, grade, rank, or rating. 5 USC 6381(11)(A).
- For veterans, "serious injury or illness" refers to injury or illness that was incurred or aggravated by the member in the line of duty on active duty in the armed forces and that manifested itself before or after the member became a veteran. 5 USC 6381(11)(B).

Amount of leave time

- When an eligible employee takes leave to care for a covered servicemember with a serious injury or illness, the employee is entitled to 26 weeks of leave during a single 12-month period to care for the servicemember. 5 USC 6382(a)(3).
- During this single 12-month period, an employee is entitled to a combined total of 26 weeks of FMLA, whether taken under servicemember-related or general FMLA provisions. 5 USC 6382(a)(4).

Notice

- Under the Title II's qualifying exigency regulations, if the need for leave taken under 5 CFR 630.1203(a)(5) is foreseeable, the employee must provide notice "as soon as practicable, regardless of how far in advance the leave is being requested." 5 CFR 630.1207(c).

Certification

- When a qualifying exigency is involved, an agency may require the employee to provide a copy of the covered military member's active duty orders or other documentation issued by the military that indicates that the covered military member is on covered active duty or call to covered active duty status. 5 CFR 630.1209(a).
- The information an agency may require in the certification documentation includes:
    - A statement of appropriate facts regarding the qualifying exigency.
    - The approximate date on which the qualifying exigency commenced or will commence.
    - Beginning and end dates for continuous periods of leave.
    - An estimate of the frequency and duration of intermittent leave.
    - Contact information of relevant third parties if the qualifying exigency involves meeting with a third party. 5 CFR 630.1209(b).
- If an employee submits a complete and sufficient certification to support her request for qualifying exigency leave, the agency may not request additional information. 5 CFR 630.1209(c).

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