



## FAIRBANKS NORTH STAR BOROUGH SCHOOL DISTRICT HUMAN RESOURCES DEPARTMENT

### FMLA Frequently Asked Questions

#### General

##### **(Q) What does the Family and Medical leave act provide?**

The Family and Medical Leave Act (FMLA) provides eligible employees up to 12 workweeks of unpaid leave a year, and requires group health benefits to be maintained during the leave as if employees continued to work instead of taking leave. Employees are also entitled to return to their same or an equivalent job at the end of their FMLA leave.

The FMLA also provides certain military family leave entitlements. Eligible employees may take FMLA leave for specified reasons related to certain military deployments of their family members. Additionally, they may take up to 26 weeks of FMLA leave in a single 12-month period to care for a covered servicemember with a serious injury or illness.

#### Coverage

##### **(Q) What types of businesses/employers does the FMLA apply to?**

The FMLA applies to all: public agencies, including local, State, and Federal employers, and local education agencies (schools); and private sector employers who employ 50 or more employees for at least 20 workweeks in the current or preceding calendar year – including joint employers and successors of covered employers.

#### Eligibility

##### **(Q) Who can take FMLA leave?**

In order to be eligible to take leave under the FMLA, an employee must:

work for a covered employer;

have worked 1,250 hours during the 12 months prior to the start of leave;

work at a location where the employer has 50 or more employees within 75 miles; and

have worked for the employer for 12 months. The 12 months of employment are not required to be consecutive in order for the employee to qualify for FMLA leave. In general, only employment within seven years is counted unless the break in service is (1) due to an employee's fulfillment of military obligations, or (2) governed by a collective bargaining agreement or other written agreement.

#### Hours of Service Requirement

##### **(Q) Does the time I take off for vacation, sick leave or PTO count toward the 1,250 hours?**

The 1,250 hours include only those hours actually worked for the employer. Paid leave and unpaid leave, including FMLA leave, are not included.

## Unpaid leave

### **(Q) Is my employer required to pay me when I take FMLA leave?**

The FMLA only requires unpaid leave. An employee must follow the employer's normal leave rules in order to substitute paid leave. When paid leave is used for an FMLA-covered reason, the leave is FMLA-protected.

## Qualifying conditions

### **(Q) When can an eligible employee use FMLA leave?**

A covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid, job-protected leave in a 12 month period for one or more of the following reasons:

for the birth of a son or daughter, and to bond with the newborn child;

for the placement with the employee of a child for adoption or foster care, and to bond with that child;

to care for an immediate family member (spouse, child, or parent – but not a parent “in-law”) with a serious health condition;

to take medical leave when the employee is unable to work because of a serious health condition; or

for qualifying exigencies arising out of the fact that the employee's spouse, son, daughter, or parent is on covered active duty or call to covered active duty status as a member of the National Guard, Reserves, or Regular Armed Forces.

The FMLA also allows eligible employees to take up to 26 workweeks of unpaid, job-protected leave in a “single 12-month period” to care for a covered servicemember with a serious injury or illness.

## Birth and bonding

### **(Q) Are there any restrictions on when an employee can take leave for the birth or adoption of a child?**

Leave to bond with a newborn child or for a newly placed adopted or foster child must conclude within 12 months after the birth or placement. The use of intermittent FMLA leave for these purposes is subject to the employer's approval. If the newly born or newly placed child has a serious health condition, the employee has the right to take FMLA leave to care for the child intermittently, if medically necessary and such leave is not subject to the 12-month limitation.

### **(Q) When can a parent take leave for a newborn?**

Mothers and fathers have the same right to take FMLA leave to bond with a newborn child. A mother can also take FMLA leave for prenatal care, incapacity related to pregnancy, and for her own serious health condition following the birth of a child. A father can also use FMLA leave to care for his spouse who is incapacitated due to pregnancy or child birth.

## Intermittent/reduced leave schedule

### **(Q) Does an employee have to take leave all at once or can it be taken periodically or to reduce the employee's schedule?**

When it is medically necessary, employees may take FMLA leave intermittently – taking leave in separate blocks of time for a single qualifying reason – or on a reduced leave schedule – reducing the employee's usual weekly or daily work schedule. When leave is needed for planned medical treatment, the employee must make a reasonable effort to schedule treatment so as not to unduly disrupt the employer's operation.

Leave to care for or bond with a newborn child or for a newly placed adopted or foster child may only be taken intermittently with the employer's approval and must conclude within 12 months after the birth or placement.

**(Q) Can an employer change an employee's job when the employee takes intermittent or reduced schedule leave?**

Employees needing intermittent/reduced schedule leave for foreseeable medical treatments must work with their employers to schedule the leave so as not disrupt the employer's operations, subject to the approval of the employee's health care provider. In such cases, the employer may transfer the employee temporarily to an alternative job with equivalent pay and benefits that accommodate recurring periods of leave better than the employee's regular job.

## **Serious health condition**

**(Q) What is a serious health condition?**

The most common serious health conditions that qualify for FMLA leave are:

conditions requiring an overnight stay in a hospital or other medical care facility;

conditions that incapacitate you or your family member (for example, unable to work or attend school) for more than three consecutive days and have ongoing medical treatment (either multiple appointments with a health care provider, or a single appointment and follow-up care such as prescription medication);

chronic conditions that cause occasional periods when you or your family member are incapacitated and require treatment by a health care provider at least twice a year; and

pregnancy (including prenatal medical appointments, incapacity due to morning sickness, and medically required bed rest).

**(Q) Can I continue to use FMLA for leave due to my chronic serious health condition?**

Under the regulations, employees continue to be able to use FMLA leave for any period of incapacity or treatment due to a chronic serious health condition. The regulations continue to define a chronic serious health condition as one that (1) requires "periodic visits" for treatment by a health care provider or nurse under the supervision of the health care provider, (2) continues over an extended period of time, and (3) may cause episodic rather than continuing periods of incapacity. The regulations clarify this definition by defining "periodic visits" as at least twice a year.

**(Q) Can I take FMLA leave for reasons related to domestic violence issues?**

FMLA leave may be available to address certain health-related issues resulting from domestic violence. An eligible employee may take FMLA leave because of his or her own serious health condition or to care for a qualifying family member with a serious health condition that resulted from domestic violence. For example, an eligible employee may be able to take FMLA leave if he or she is hospitalized overnight or is receiving certain treatment for post-traumatic stress disorder that resulted from domestic violence.

**(Q) Can I qualify for FMLA leave when I donate an organ to a non-relative?**

Yes, an organ donation can qualify as a serious health condition under the FMLA when it involves either inpatient care or continuing treatment as defined in the regulations. Organ-donation surgery commonly requires overnight hospitalization and that alone suffices for the surgery and the post-surgery recovery to qualify as a serious health condition.

## **Certification**

**(Q) Am I required to prove that I have a serious health condition?**

An employer may require that the need for leave for a serious health condition of the employee or the employee's immediate family member be supported by a certification issued by a health care provider. The employer must allow the employee at least 15 calendar days to obtain the medical certification.

**(Q) What happens if my employer says my medical certification is incomplete?**

An employer must advise the employee if it finds the certification is incomplete and allow the employee a reasonable opportunity to cure the deficiency. The employer must state in writing what additional information is necessary to make the certification complete and sufficient and must allow the employee at least seven calendar days to cure the deficiency, unless seven days is not practicable under particular circumstances despite the employee's diligent good faith efforts.

**(Q) Can my employer make me get a second opinion?**

An employer may require a second or third medical opinion (at the employer's expense) if he or she has reason to doubt the validity of the medical certification.

**(Q) Do I have to give my employer my medical records for leave due to a serious health condition?**

No. An employee is not required to give the employer his or her medical records. The employer, however, does have a statutory right to request that an employee provide medical certification containing sufficient medical facts to establish that a serious health condition exists.

**(Q) How soon after I request leave does my employer have to request a medical certification of a serious health condition?**

Under the regulations, an employer should request medical certification, in most cases, at the time an employee gives notice of the need for leave or within five business days. If the leave is unforeseen, the employer should request medical certification within five days after the leave begins.

An employer may request certification at a later date if he or she has reason to question the appropriateness or duration of the leave.

**(Q) May my employer contact my health care provider about my serious health condition?**

The regulations clarify that contact between an employer and an employee's health care provider must comply with the Health Insurance Portability and Accountability Act (HIPAA) privacy regulations. Under the regulations, employers may contact an employee's health care provider for authentication or clarification of the medical certification by using a health care provider, a human resource professional, a leave administrator, or a management official. In order to address employee privacy concerns, the regulations makes clear that in no case may the employee's direct supervisor contact the employee's health care provider. In order for an employee's HIPAA-covered health care provider to provide an employer with individually-identifiable health information, the employee will need to provide the health care provider with a written authorization allowing the health care provider to disclose such information to the employer. Employers may not ask the health care provider for additional information beyond that contained on the medical certification form.

**(Q) Must I sign a medical release as part of a medical certification?**

No. An employer may not require an employee to sign a release or waiver as part of the medical certification process. The regulations specifically state that completing any such authorization is at the employee's discretion. Whenever an employer requests a medical certification, however, it is the employee's responsibility to provide the employer with a complete and sufficient certification. If an employee does not provide either a complete and sufficient certification or an authorization allowing the health care provider to provide a complete and sufficient certification to the employer, the employee's request for FMLA leave may be denied.

**(Q) How often may my employer ask for medical certifications for an on-going serious health condition?**

The regulations allow recertification no more often than every 30 days in connection with an absence by the employee unless the condition will last for more than 30 days. For conditions that are certified as having a minimum duration of more than 30 days, the employer must wait to request a recertification until the specified period has passed, except that in all cases the employer may request recertification every six months in connection with an absence by the employee. The regulations also allow an employer to request recertification in less than 30 days if the employee requests an extension of leave, the circumstances described in the previous certification have changed significantly, or if the employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification.

Additionally, employers may request a new medical certification each leave year for medical conditions that last longer than one year. Such new medical certifications are subject to second and third opinions.

Examples:

Janie takes six weeks of FMLA leave for a cancer operation and treatment and gives her employer a medical certification that states that she will be absent for six weeks. Because her certification covers a six-week absence, her employer cannot ask for a recertification during that time. At the end of the six-week period, Janie asks to take two more weeks of FMLA leave; her employer may properly ask Janie for a recertification for the additional two weeks.

Joe takes eight weeks of FMLA leave for a back operation and intensive therapy, and gives his employer a medical certification that states that he will be absent for eight weeks. At the end of the eight-week period, Joe tells his employer that he will need to take three days of FMLA leave per month for an indefinite period for additional therapy; his employer may properly request a recertification at that time. Six months later, and in connection with an absence for therapy, the employer may properly ask Joe for another recertification for his need for FMLA leave.

**(Q) Can employers require employees to submit a fitness-for-duty certification before returning to work after being absent due to a serious health condition?**

Yes. As a condition of restoring an employee who was absent on FMLA leave due to the employee's own serious health condition, an employer may have a uniformly applied policy or practice that requires all similarly situated employees who take leave for such conditions to submit a certification from the employee's own health care provider that the employee is able to resume work. Under the regulations, an employer may require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the position if the employer has appropriately notified the employee that this information will be required and has provided a list of essential functions. Additionally, an employer may require a fitness-for-duty certification up to once every 30 days for an employee taking intermittent or reduced schedule FMLA leave if reasonable safety concerns exist regarding the employee's ability to perform his or her duties based on the condition for which leave was taken.

**(Q) What happens if I do not submit a requested medical or fitness-for-duty certification?**

If an employee fails to timely submit a properly requested medical certification (absent sufficient explanation of the delay), FMLA protection for the leave may be delayed or denied. If the employee never provides a medical certification, then the leave is not FMLA leave.

If an employee fails to submit a properly requested fitness-for-duty certification, the employer may delay job restoration until the employee provides the certification. If the employee never provides the certification, he or she may be denied reinstatement.

## **Job restoration**

**(Q) Can my employer move me to a different job when I return from FMLA leave?**

On return from FMLA leave (whether after a block of leave or an instance of intermittent leave), the FMLA requires that the employer return the employee to the same job, or one that is nearly identical (equivalent).

If not returned to the same job, a nearly identical job must:

offer the same shift or general work schedule, and be at a geographically proximate worksite (i.e., one that does not involve a significant increase in commuting time or distance);

involve the same or substantially similar duties, responsibilities, and status;

include the same general level of skill, effort, responsibility and authority;

offer identical pay, including equivalent premium pay, overtime and bonus opportunities, profit-sharing, or other payments, and any unconditional pay increases that occurred during FMLA leave; and

offer identical benefits (such as life insurance, health insurance, disability insurance, sick leave, vacation, educational benefits, pensions, etc.).

## **Employee notice**

### **(Q) What and when do I need to tell my employer if I plan to take FMLA leave?**

Employees seeking to use FMLA leave are required to provide 30-day advance notice of the need to take FMLA leave when the need is foreseeable and such notice is practicable. If leave is foreseeable less than 30 days in advance, the employee must provide notice as soon as practicable – generally, either the same or next business day. When the need for leave is not foreseeable, the employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. Absent unusual circumstances, employees must comply with the employer’s usual and customary notice and procedural requirements for requesting leave.

Employees must provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include that the employee is incapacitated due to pregnancy, has been hospitalized overnight, is unable to perform the functions of the job, and/or that the employee or employee’s qualifying family member is under the continuing care of a health care provider.

When an employee seeks leave for a FMLA-qualifying reason for the first time, the employee need not expressly assert FMLA rights or even mention the FMLA. When an employee seeks leave, however, due to a FMLA-qualifying reason for which the employer has previously provided the employee FMLA-protected leave, the employee must specifically reference either the qualifying reason for the leave or the need for FMLA leave.

### **(Q) Is an employee required to follow an employer’s normal call-in procedures when taking FMLA leave?**

Yes. Under the regulations, an employee must comply with an employer’s call-in procedures unless unusual circumstances prevent the employee from doing so (in which case the employee must provide notice as soon as he or she can practicably do so). The regulations make clear that, if the employee fails to provide timely notice, he or she may have the FMLA leave request delayed or denied and may be subject to whatever discipline the employer’s rules provide.

Example:

Sam has a medical certification on file with his employer for his chronic serious health condition, migraine headaches. He is unable to report to work at the start of his shift due to a migraine and needs to take unforeseeable FMLA leave. He follows his employer’s absence call-in procedure to timely notify his employer about his need for leave. Sam has provided his employer with appropriate notice.

## **Employer notice**

### **(Q) Are employers required to tell their employees of the existence of FMLA and the employee’s right to take FMLA leave?**

Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the FMLA's provisions and providing information concerning the procedures for filing complaints of violations of the FMLA with the Wage and Hour Division. An employer that willfully violates this posting requirement may be subject to a civil money penalty for each separate offense. For current penalty amounts, see [www.dol.gov/whd/fmla/applicable\\_laws.htm](http://www.dol.gov/whd/fmla/applicable_laws.htm). Additionally, employers must include this general notice in employee handbooks or other written guidance to employees concerning benefits, or, if no such materials exist, must distribute a copy of the notice to each new employee upon hiring.

When an employee requests FMLA leave or the employer acquires knowledge that leave may be for a FMLA purpose, the employer must notify the employee of his or her eligibility to take leave, and inform the employee of his or her rights and responsibilities under the FMLA. When the employer has enough information to determine that leave is being taken for a FMLA-qualifying reason, the employer must notify the employee that the leave is designated and will be counted as FMLA leave.

**(Q) How soon after an employee provides notice of the need for leave must an employer determine whether someone is eligible for FMLA leave?**

Absent extenuating circumstances, the regulations require an employer to notify an employee of whether the employee is eligible to take FMLA leave (and, if not, at least one reason why the employee is ineligible) within five business days of the employee requesting leave or the employer learning that an employee's leave may be for a FMLA-qualifying reason.

**(Q) Does an employer have to provide employees with information regarding their specific rights and responsibilities under the FMLA?**

At the same time an employer provides an employee notice of the employee's eligibility to take FMLA leave, the employer must also notify the employee of the specific expectations and obligations associated with the leave. Among other information included in this notice, the employer must inform the employee whether the employee will be required to provide certification of the FMLA-qualifying reason for leave and the employee's right to substitute paid leave (including any conditions related to such substitution, and the employee's entitlement to unpaid FMLA leave if those conditions are not met). If the information included in the notice of rights and responsibilities changes, the employer must inform the employee of such changes within five business days of receipt of the employee's first notice of the need for FMLA leave subsequent to any change. Employers are expected to responsively answer questions from employees concerning their rights and responsibilities.

**(Q) How soon after an employee provides notice of the need for leave must an employer notify an employee that the leave will be designated and counted as FMLA leave?**

Under the regulations, an employer must notify an employee whether leave will be designated as FMLA leave within five business days of learning that the leave is being taken for a FMLA-qualifying reason, absent extenuating circumstances. The designation notice must also state whether paid leave will be substituted for unpaid FMLA leave and whether the employer will require the employee to provide a fitness-for-duty certification to return to work (unless a handbook or other written document clearly provides that such certification will be required in specific circumstances, in which case the employer may provide oral notice of this requirement). Additionally, if the amount of leave needed is known, an employer must inform an employee of the number of hours, days or weeks that will be counted against the employee's FMLA leave entitlement in the designation notice. Where it is not possible to provide the number of hours, days, or weeks that will be counted as FMLA leave in the designation notice (e.g., where the leave will be unscheduled), an employer must provide this information upon request by the employee, but no more often than every 30 days and only if leave was taken during that period.

## **Military provisions**

**(Q) What is covered active duty?**

For 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.

For a member of the Reserve components of the Armed Forces (members of the National Guard and Reserves), *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 under a Federal call or order to active duty in support of a contingency operation.

**(Q) What is the definition of deployment of a member with the Armed Forces to a foreign country?**

Deployment to a foreign country means the military member is deployed to an area outside of the United States, the District of Columbia, or any Territory or possession of the United States. Deployment to a foreign country includes deployment to international waters.

## Caregiver leave

**(Q) Are families of servicemembers in the Regular Armed Forces eligible for military caregiver leave?**

Yes. Military caregiver leave extends to those seriously injured or ill members of both the Regular Armed Forces and the National Guard or Reserves.

**(Q) Can I take military caregiver leave if I am the stepson or stepdaughter of the covered servicemember or if I am the stepparent of a covered servicemember?**

Yes. Under the FMLA for military caregiver leave, a "son or daughter of a covered servicemember" means a covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, and who is of any age. Under the FMLA for military caregiver leave, a "parent of a covered servicemember" means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents "in law."

**(Q) How much leave may I take to care to for a covered servicemember?**

An eligible employee is entitled to take up to 26 workweeks of leave during a "single 12-month period" to care for a seriously injured or ill covered servicemember. The "single 12-month period" begins on the first day the eligible employee takes military caregiver leave and ends 12 months after that date, regardless of the method used by the employer to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons.

**(Q) May I take FMLA leave to both care for a covered servicemember and for another FMLA qualifying reason during this "single 12-month period?"**

Yes. The regulations provide that an eligible employee is entitled to a combined total of 26 workweeks of military caregiver leave and leave for any other FMLA-qualifying reason in this single 12-month period, provided that the employee may not take more than 12 workweeks of leave for any other FMLA-qualifying reason during this period. For example, in the single 12-month period an employee could take 12 weeks of FMLA leave to care for a newborn child and 14 weeks of military caregiver leave, but could not take 16 weeks of leave to care for a newborn child and 10 weeks of military caregiver leave.

**(Q) Can I carry-over unused weeks of military caregiver leave from one 12-month period to another?**

No. If an employee does not use his or her entire 26-workweek leave entitlement during the single 12-month period of leave, the remaining workweeks of leave are forfeited. After the end of the single 12-month period for military caregiver leave, however, an employee may be entitled to take FMLA leave to care for the covered military member if the member is a qualifying family member under non-military FMLA and he or she has a serious health condition.

**(Q) Who is a servicemember's next of kin for purposes of military caregiver leave?**

The regulations define a covered servicemember's "next of kin" as the servicemember's nearest blood relative, other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under FMLA, in which case the designated individual shall be deemed to be the covered servicemember's next of kin. The regulations provide that all family members sharing the closest level of familial relationship to the covered servicemember shall be considered the covered servicemember's next of kin, unless the covered servicemember has specifically designated an individual as his or her next of kin for military caregiver leave.

purposes. In the absence of a designation, where a covered servicemember has three siblings, for example, all three siblings will be considered the covered servicemember's next of kin.

**(Q) Can I take military caregiver leave for more than one seriously injured or ill servicemember, or more than once for the same servicemember if he or she has a subsequent serious injury or illness?**

Yes. By regulation, military caregiver leave is a "per-servicemember, per-injury" entitlement. Accordingly, an eligible employee may take 26 workweeks of leave to care for one covered servicemember in a "single 12-month period," and then take another 26 workweeks of leave in a different "single 12-month period" to care for another covered servicemember. An eligible employee may also take 26 workweeks of leave to care for a covered servicemember in a "single 12-month period," and then take another 26 workweeks of leave in a different "single 12-month period" to care for the same servicemember with a subsequent serious injury or illness (e.g., if the servicemember is returned to active duty and suffers another injury).

**(Q) Can I care for two seriously injured or ill servicemembers at the same time?**

Yes. However, an eligible employee may not take more than 26 workweeks of leave during each single 12-month period.

**(Q) What if my covered servicemember receives a catastrophic injury and the military issues me travel orders to immediately fly to Landstuhl Regional Medical Center in Germany to be at his bedside. Do I have to provide a completed certification before flying to Germany?**

No. Given the seriousness of the injuries or illnesses incurred by a servicemember whose family receives an invitational travel order (ITO) or invitational travel authorization (ITA), and the immediate need for the family member at the servicemember's bedside, the regulations require an employer to accept the submission of an ITO or ITA, in lieu of the DOL optional certification form or an employer's own form, as sufficient certification of a request for military caregiver leave during the time period specified in the ITO or ITA.

The regulations also permit an eligible employee who is a spouse, parent, son, daughter or next of kin of a covered servicemember to submit an ITO or ITA issued to another family member as sufficient certification for the duration of time specified in the ITO or ITA, even if the employee seeking leave is not the named recipient on the ITO or ITA.

If the covered servicemember's need for care extends beyond the expiration date specified in the ITO or ITA, the regulations permit an employer to require an employee to provide certification for the remainder of the employee's leave period.

**(Q) How is leave designated if it qualifies as both military caregiver leave and leave to care for a family member with a serious health condition?**

For military caregiver leave that also qualifies as leave taken to care for a family member with a serious health condition, the regulations provide that an employer must designate the leave as military caregiver leave first. The Department believes that applying military caregiver leave first will help to alleviate some of the administrative issues caused by the running of the separate single 12-month period for military caregiver leave.

The regulations also prohibit an employer from counting leave that qualifies as both military caregiver leave and leave to care for a family member with a serious health condition against both an employee's entitlement to 26 workweeks of military caregiver leave and 12 workweeks of leave for other FMLA-qualifying reasons.

**(Q) What type of notice must I provide to my employer when taking FMLA leave because of a qualifying exigency?**

An employee must provide notice of the need for qualifying exigency leave as soon as practicable. For example, if an employee receives notice of a family support program a week in advance of the event, it should be practicable for the employee to provide notice to his or her employer of the need for qualifying exigency leave the same day or the next business day. When the need for leave is unforeseeable, an employee must comply with an employer's normal call-in procedures absent unusual circumstances.

An employee does not need to specifically assert his or her rights under FMLA, or even mention FMLA, when providing notice. The employee must provide "sufficient information" to make the employer aware of the need for FMLA leave and the anticipated timing and duration of the leave.

**(Q) Are the certification procedures (timing, authentication, clarification, second and third opinions, recertification) the same for qualifying exigency leave and leave due to a serious health condition?**

The same timing requirements for certification apply to all requests for FMLA leave, including those for military family leave. Thus, an employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

If the qualifying exigency involves a meeting with a third party, employers may verify the schedule and purpose of the meeting with the third party. Additionally, an employer may contact the appropriate unit of the Department of Defense to confirm that the military member is on covered active duty or call to covered active duty status.

Employers are not permitted to require second or third opinions on qualifying exigency certifications. Employers are also not permitted to require recertification for such leave.

**(Q) How much FMLA leave may I take for qualifying exigencies?**

An employee may take up to 12 workweeks of FMLA leave for qualifying exigencies during the twelve-month period established by the employer for FMLA leave. Qualifying exigency leave may also be taken on an intermittent or reduced leave schedule basis.

**(Q) How much leave can I take if I need leave for both a serious health condition and a qualifying exigency?**

Qualifying exigency leave, like leave for a serious health condition, is a FMLA-qualifying reason for which an eligible employee may use his or her entitlement for up to 12 workweeks of FMLA leave each year. An eligible employee may take all 12 weeks of his or her FMLA leave entitlement as qualifying exigency leave or the employee may take a combination of 12 weeks of leave for both qualifying exigency leave and leave for a serious health condition.

**(Q) Can I take qualifying exigency leave when my military member returns from deployment?**

Yes. An eligible employee is entitled to take qualifying exigency leave for certain qualifying post-deployment exigencies, including reintegration activities, for a period of 90 days following the termination of the military member's covered active duty status.

## **USERRA-FMLA Questions**

**(Q) What is the Uniformed Services Employment and Reemployment Rights Act (USERRA)?**

USERRA is a federal law that provides reemployment rights for veterans and members of the National Guard and Reserve following qualifying military service. It also prohibits employer discrimination against any person on the basis of that person's past USERRA-covered service, current military obligations, or intent to join one of the uniformed services.

**(Q) What effect does USERRA have on FMLA-eligibility requirements?**

USERRA requires that servicemembers who conclude their tours of duty and who are reemployed by their civilian employers receive all benefits of employment that they would have obtained if they had been continuously employed, except those benefits that are considered a form of short-term compensation, such as accrued paid vacation. If a servicemember had been continuously employed, one such benefit to which he or she might have been entitled is leave under the FMLA. The servicemember's eligibility will depend upon whether the servicemember would have met the employee eligibility requirements outlined above had he or she not performed USERRA-covered service.

**(Q) How should the 12-month FMLA requirement be calculated for returning servicemembers?**

USERRA requires that a person reemployed under its provisions be given credit for any months of service he or she would have been employed but for the period of absence from work due to or necessitated by USERRA-covered service in determining eligibility for FMLA leave. A person reemployed following USERRA-covered service should be given credit for the period of absence from work due to or necessitated by USERRA-covered service towards the months-of-employment eligibility requirement. Each month served performing USERRA-covered service counts as a month actively employed by the employer. For example, someone who has been employed by an employer for nine months is ordered to active military service for nine months after which he or she is reemployed. Upon reemployment, the person must be considered to have been employed by the employer for more than the required 12 months (nine months actually employed plus nine months of USERRA-covered service) for purposes of FMLA eligibility. It should be noted that the 12 months of employment need not be consecutive to meet this FMLA requirement.

**(Q) How should the 1,250 hours-of-service requirement be calculated for returning servicemembers?**

An employee returning from USERRA-covered service must be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service in determining FMLA eligibility. Accordingly, a person reemployed following USERRA-covered service has the hours that would have been worked for the employer added to any hours actually worked during the previous 12-month period to meet the 1,250 hour requirement. In order to determine the hours that would have been worked during the period of absence from work due to or necessitated by USERRA-covered service, the employee's pre-service work schedule can generally be used for calculations. For example, an employee who works 40 hours per week for the employer returns to employment following 20 weeks of USERRA-covered service and requests leave under the FMLA. To determine the person's eligibility, the hours he or she would have worked during the period of USERRA-covered service (20 x 40 = 800 hours) must be added to the hours actually worked during the 12-month period prior to the start of the leave to determine if the 1,250 hour requirement is met. [Special hours of service eligibility requirements apply to airline flight crew employees.](#)

**(Q) Where can I get more information about USERRA and the FMLA?**

The Department of Labor's Veterans' Employment and Training Service (VETS) administers USERRA, provides technical assistance/educational outreach, and investigates complaints. Information about USERRA is available on the VETS website. The address is <http://www.dol.gov/vets/>. There you will find USERRA information as well as a directory of local VETS offices.

## **Miscellaneous Questions**

**(Q) I am a caregiver for my brother who is not able to take care of himself. Can I take FMLA leave for his care?**

Maybe. FMLA leave to care for a relative is generally limited to caring for a spouse, son, daughter, or parent. An eligible employee standing in loco parentis to a sibling who is under 18, or who is 18 years of age or older and incapable of self-care because of a mental or physical disability, may take leave to care for the sibling, if the sibling has an FMLA-qualifying serious health condition.

**(Q) My medical condition limits me to a 40 hour workweek but my employer has assigned me to work eight hours of overtime in a week. Can I take FMLA leave for the overtime?**

Yes. Employees with proper medical certifications may use FMLA leave in lieu of working required overtime hours. The regulations clarify that the hours that an employee would have been required to work but for the taking of FMLA leave can be counted against the employee's FMLA entitlement. Employers must select employees for required overtime in a manner that does not discriminate against workers who need to use FMLA leave.

**(Q) Can I use my paid leave as FMLA leave?**

Under the regulations, an employee may choose to substitute accrued paid leave for unpaid FMLA leave if the employee complies with the terms and conditions of the employer's applicable paid leave policy. The regulations also clarify that substituting paid leave for unpaid FMLA leave means that the two types of leave run concurrently, with the employee receiving

pay pursuant to the paid leave policy and receiving protection for the leave under the FMLA. If the employee does not choose to substitute applicable accrued paid leave, the employer may require the employee to do so.

Example:

Neila needs to take two hours of FMLA leave for a treatment appointment for her serious health condition. Neila would like to substitute paid sick leave for her absence, but her employer's sick policy only permits employees to take sick leave in full days. Neila may either choose to comply with her employer's sick leave policy by taking a full day of sick leave for her doctor's appointment (in which case she will use a full day of FMLA leave), or she may ask her employer to waive the requirement that sick leave be used in full day increments and permit her to use two hours of sick leave for her FMLA absence. Neila can also take unpaid FMLA leave for the two hours.

**(Q) How do collective bargaining agreements (CBAs) affect the FMLA Regulations?**

An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the FMLA may not be diminished by any employment benefit program or plan. For example, a provision of a CBA which provides for reinstatement to a position that is not equivalent because of seniority (e.g., provides lesser pay) is superseded by FMLA.