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# Qualifying Reasons for FMLA Leave

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Please feel free to contact us if you have questions or comments regarding this information or any other CTAS website material.

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Table of Contents

<b>Qualifying Reasons for FMLA Leave .....</b>	<b>. 3</b>
<b>Leave for Birth, Adoption and Foster Care .....</b>	<b>. 3</b>
<b>Leave for Serious Health Condition .....</b>	<b>. 4</b>
<b>Leave for Treatment of Substance Abuse .....</b>	<b>. 5</b>
<b>Military-related Leave .....</b>	<b>. 5</b>
<b>Leave for Qualifying Exigency .....</b>	<b>. 5</b>
<b>Military Caregiver Leave .....</b>	<b>. 6</b>

# Qualifying Reasons for FMLA Leave

Reference Number: CTAS-1017

Generally, leave under the FMLA falls into one of the following three broad categories:

1. Leave related to birth, adoption and foster care, which includes:
  - (a) leave taken for pregnancy, birth, and to be with the healthy newborn child; and
  - (b) leave taken for the placement of a child for adoption or foster care, and to care for the child after placement.
2. Leave for a serious health condition of the employee or an immediate family member that includes:
  - (a) leave taken to care for spouse, son, daughter or parent with serious health condition; and
  - (b) leave taken for the employee's own serious health condition that makes the employee unable to perform the functions of the employee's job.
3. Military-related leave, which includes:
  - (a) qualifying exigency leave, taken for a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on covered active duty or has been notified of an impending call to covered active duty; and
  - (b) military caregiver leave, taken by an employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember to care for the servicemember who has incurred a serious injury or illness in the line of duty on active duty.<sup>[1]</sup>

The following general definitions apply for all types of FMLA leave:

"Spouse" means a husband or wife as defined or recognized under state law.<sup>[2]</sup> Tennessee does not recognize common law marriages within this state, but Tennessee courts will recognize a common law marriage contracted in a state where common law marriages are valid.<sup>[3]</sup> Therefore, "spouse" includes legally married husbands and wives, and persons who are married under the common law of a state that allows common-law marriages.

"Parent" includes biological, adoptive, step or foster parents and persons who stood "in loco parentis" (see definition below) to the employee when the employee was a child. It does not include parents "in law."<sup>[4]</sup>

"Son/Daughter" includes biological, adopted, and foster children, stepchildren, legal wards, and children of a person standing "in loco parentis"; it includes all children under 18, but does not include children who are over 18 unless they are incapable of self-care because of a mental or physical disability. For military-related leave, the son or daughter can be of any age.<sup>[5]</sup>

"In Loco Parentis" includes persons with day-to-day responsibilities for the care and financial support of a child, regardless of the existence of any biological or legal relationship.<sup>[6]</sup>

Additional definitions for military-related FMLA leave are covered in the section on military-related leave.

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[1] 29 C.F.R. § 825.112

[2] 29 C.F.R. § 825.122.

[3] See, e.g., *Troxel v. Jones*, 322 S.W.2d 251 (1958).

[4] 29 C.F.R. § 825.122.

[5] 29 C.F.R. § 825.122.

[6] 29 C.F.R. § 825.122.

# Leave for Birth, Adoption and Foster Care

Reference Number: CTAS-1018

A father, as well as a mother, can take leave for the birth or placement of a child.<sup>[1]</sup> This leave must be concluded within the 12-month period beginning with the date of birth or placement of the child. The employer is not required to allow intermittent or reduced leave for the placement of a child unless it is

medically necessary.

Pregnancy and Childbirth.<sup>[2]</sup> Both the mother and father are entitled to FMLA leave for the birth of the child, and to bond with a healthy infant during the 12-month period beginning on the date of birth. The mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth. The incapacity due to pregnancy does not have to meet the other requirements for a serious health condition. For example, the employee may be unable to report to work due to severe morning sickness. The husband is entitled to FMLA leave if needed to care for his pregnant spouse who is incapacitated or if needed to care for her during prenatal care, or to care for her following the birth if the spouse has a serious health condition.

Adoption and Foster Care.<sup>[3]</sup> For adoption and foster care, leave can begin before the actual placement of a child if it is required for the placement to proceed (for example, required counseling, court appearances and the like). Whether an adoption is through a public or private agency does not matter. The age of the child does not matter. Placement for foster care must involve State action, and does not include informal arrangements.

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[1] 29 C.F.R. § 825.112.

[2] 29 C.F.R. § 825.120.

[3] 29 C.F.R. § 825.121.

## Leave for Serious Health Condition

Reference Number: CTAS-1019

Eligible employees are entitled to take leave under the FMLA for their own serious health condition that renders them unable to perform the functions of their job, or to care for the employee's spouse, son, daughter or parent with a serious health condition.

Definition of "Serious Health Condition".<sup>[1]</sup> A "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves either (1) inpatient care, or (2) continuing treatment by a health care provider.<sup>[2]</sup> "*Inpatient care*" means an overnight stay in a hospital, hospice, or residential medical care facility; any overnight stay in the hospital automatically qualifies as a serious health condition.<sup>[3]</sup> If inpatient care is not involved, the person must be under "*continuing treatment by a healthcare provider,*" which includes any one or more of the following:

1. Incapacity and Treatment. The person is incapacitated (unable to work, attend school, or perform other regular daily activities) for more than three consecutive full days, and either is treated in person two or more times by a health care provider within 30 days (absent extenuating circumstances), or is treated once in person by a health care provider with a regimen of continuing treatment under the supervision of the health care provider. The first treatment by the health care provider must be within seven days of the first day of incapacity. A regimen of continuing treatment includes, for example, a course of prescription medication or therapy requiring special equipment, such as oxygen. It does not generally include over-the-counter medications such as aspirin, antihistamines, or salves, or bed rest, drinking fluids, exercise, or other similar activities that can be initiated without visiting a health care provider. Unless complications arise, the common cold, flu, ear aches, upset stomach, minor ulcers, headaches (other than migraine), routine dental or orthodontia problems, periodontal disease, and the like do not meet the definition of a serious health condition.
2. Pregnancy or Prenatal Care. Any period of incapacity due to pregnancy, or for prenatal care. The person is not required to receive medical treatment during the absence, and the absence may be less than three days. For example, an employee may be unable to report to work due to severe morning sickness.
3. Chronic Conditions. Any period of incapacity due to a chronic serious health condition, and treatment for a chronic serious health condition. A chronic serious health condition is one that requires periodic visits (at least twice a year) to a health care provider or nurse, continues over an extended period of time, and may cause episodic rather than continuous incapacity. Examples of chronic conditions are asthma, epilepsy, and diabetes. The person is not required to receive medical treatment during the absence, and the absence may be less than three days. For example, an employee may not be able to report to work due to the onset of an asthma attack.
4. Permanent Long-term Conditions. These conditions result in a period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. Examples are Alzheimer's, a

severe stroke, or the terminal stages of a disease. The person need not be receiving active treatment, but must be under the continuing supervision of a healthcare provider.

5. Conditions Requiring Multiple Treatments. This category includes conditions that if left untreated would likely result in a period of incapacity of more than three days, such as cancer, severe arthritis, and kidney disease, which require treatments like chemotherapy, radiation, physical therapy and dialysis. It also includes restorative surgery after an accident or injury.

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[1] 29 C.F.R. §§ 825.113, 825.114, 825.115.

[2] 29 C.F.R. § 825.113.

[3] 29 C.F.R. § 825.114.

## Leave for Treatment of Substance Abuse

Reference Number: CTAS-1020

Substance abuse can be considered a serious health condition if it falls within one of the categories defining a serious health condition, but FMLA leave can only be taken for treatment for substance abuse that is given by a health care provider or on referral by a health care provider. Absence for the employee's use of the substance does not qualify for FMLA leave.<sup>[1]</sup>

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[1] 29 C.F.R. § 825.119.

## Military-related Leave

Reference Number: CTAS-1021

The 2008 amendments to the FMLA, and additional amendments made in 2009 in the National Defense Authorization Act for FY 2010 (NDAA 2010), added provisions for qualifying exigency leave when the employee's family member is serving on active duty or is called to active duty in a foreign country, and military caregiver leave to care for a family member who becomes seriously injured or ill in the line of duty while on active duty. These new provisions allow eligible employees to take up to 12 workweeks to attend to qualifying exigencies when the employee's spouse, son, daughter or parent is on covered active duty or is called to covered active duty, and up to 26 workweeks in a single 12-month period to care for the employee's spouse, son, daughter, parent, or next of kin with a serious injury or illness incurred in the line of duty on active duty.<sup>[1]</sup>

Protections afforded by Uniformed Services Employment and Reemployment Rights Act (USERRA) extend to all military members (active duty and reserve), and all periods of absence from work due to or necessitated by USERRA-covered service is counted in determining an employee's eligibility for FMLA leave. (29 CFR § 825.110).

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[1] 29 C.F.R. §§ 825.126, 825.127.

## Leave for Qualifying Exigency

Reference Number: CTAS-1022

An eligible employee is entitled to take FMLA leave for any "qualifying exigency" arising out of the fact that the employee's spouse, son, daughter, or parent is on, or has been notified of an impending call to, "covered active duty."<sup>[1]</sup> "Covered active duty" means (1) in the case of a member of the regular component of the Armed Forces, duty during deployment to a foreign country, and (2) in the case of a member of the reserve component of the Armed Forces, duty during deployment with the Armed Forces to a foreign country under a call to active duty.<sup>[2]</sup> "Qualifying exigency" includes the following: short-notice deployment, military events and related activities, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation and post-deployment activities. It also includes any additional activities that are agreed upon by the employee and employer.<sup>[3]</sup>

Eligible employees may take FMLA leave for the following “qualifying exigencies” that occur in connection with covered active duty or a call to covered active duty of the employee’s spouse, son, daughter or parent:

1. Short notice deployment. Leave may be taken to address any issues arising from the fact that a covered military member is notified of an impending call or order to active duty in support of a contingency operation seven calendar days or less prior to the date of deployment. Leave for this purpose can be used for seven calendar days after the notice is received.
2. Military events and related activities. Leave may be taken to attend official ceremonies and events sponsored by the military related to the call to active duty, or to attend support or assistance programs or informational briefings.
3. Childcare and school activities. Leave may be taken to arrange for alternative childcare, to provide childcare on an urgent, immediate need basis, to enroll in or transfer to a new school or daycare facility, or to attend school meetings necessitated by the call to active duty.
4. Financial and legal arrangements. Leave may be taken to make legal and financial arrangements to address the military member’s absence while on active duty, or to act as the military member’s representative before a federal, state, or local agency regarding military service benefits.
5. Counseling. Leave may be taken to attend counseling provided by someone other than a health care provider.
6. Rest and recuperation. Up to fifteen days of leave may be taken to spend time with the military member on rest and recuperation leave during the period of deployment.
7. Post-deployment activities. Leave may be taken to attend arrival ceremonies, reintegration events, and other official ceremonies or programs sponsored by the military for 90 days after termination of active duty status, or to address issues arising from death of a military member while on active duty.
8. Parental care. Care for a military member’s parent who is incapable to self-care when the care is necessitated by the member’s covered active duty. Such care may include arranging for alternative care, providing care on an immediate need basis, admitting or transferring the parent to a care facility, or attending meetings with staff at a care facility. 29 C.F.R. § 825.126.
9. Additional activities. Leave may be taken for other events related to the military member’s active duty or call to active duty as long as the employee and the employer agree that the leave qualifies as an exigency and agree on the timing and duration of the leave.

Employees seeking qualifying exigency leave are required to give their employer reasonable notice if the exigency is foreseeable. The notice must advise the employer that a covered family member is on active duty or call-to-active-duty status, give a listed reason for the leave, and give the anticipated length of the absence. Covered active duty requires deployment to a foreign country. 29 CFR § 825.126.

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[1] 29 C.F.R. § 825.126.

[2] FMLA Section 101, as amended by NDAA 2010.

[3] 29 C.F.R. § 825.126.

## Military Caregiver Leave

Reference Number: CTAS-1023

An eligible employee who is the spouse, son, daughter, parent, or next of kin of a “covered servicemember” is entitled to take FMLA leave to care for the covered servicemember with a “serious injury or illness”.<sup>[1]</sup> 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, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or (2) 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 National Guard and Reserves) at any time during the period of five years preceding the date on which the veteran undergoes the treatment, recuperation, or therapy.<sup>[2]</sup> “Next of kin” means the nearest blood relative of that individual.

A "serious injury or illness" means in the case of a current member of the Armed Forces, including the National Guard or Reserves, an injury or illness incurred in the line of duty on active duty (or which existed prior to active duty but was aggravated by service in the line of duty on active duty) that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating. 29 CFR § 825.127.

A serious injury or illness for a covered veteran 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 manifested itself before or after the member became a veteran, and is-

1. A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank or rating; or
2. A physical or mental condition for which the covered veteran has received a VA Service Related Disability Rating (VASRD) of 50 percent or greater and such VASRD rating is based, in whole or in part, on the condition precipitating the need for caregiver leave; or
3. A physical or mental condition that substantially impairs the veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service or would do so absent treatment; or
4. An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. 29 C.F.R. § 825.127.

Leave under this category is calculated differently than other types of FMLA leave. Unlike the other types of leave under the FMLA, eligible employees are entitled to 26 workweeks in a single 12-month period to care for the covered servicemember with a serious injury or illness. The single 12-month period begins on the first day the employee takes leave to care for the servicemember and continues for 12 months thereafter, regardless of the method used to calculate other types of FMLA leave. If the employee does not take all of the 26-workweek entitlement during this single 12-month period, the remainder is forfeited. The leave entitlement applies on a per-covered-servicemember, per-injury basis, so an eligible employee could be entitled to more than one 26-week period of leave if more than one family member is involved or subsequent illness or injury occurs, but no more than 26 workweeks can be taken within any single 12-month period.

An employee is limited to a combined total of no more than 26 workweeks of leave for any FMLA-qualifying reason during the single 12-month period, and is limited to a total of 12 workweeks for all other FMLA leave (birth or placement of a child, serious health condition of employee or immediate family or qualifying exigency).

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[1] 29 C.F.R. § 825.127.

[2] 29 C.F.R. §825.127, FMLA Section 101, as amended by NDAA 2010.

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