

NEED TIME?



The Family and Medical Leave Act



U.S. Department of Labor
Wage and Hour Division



1-866-4-USWAGE



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The Family and Medical Leave Act

Presented by the
U.S. Department of Labor
Wage and Hour Division



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Introduction to the FMLA

[§ 825.101](#)

- Purpose:
 - Balance work and family life
 - Promote economic security of families and serve national interest in preserving family integrity
- Shared Responsibilities:
 - Communication is key



FMLA Works

- The FMLA has served as the cornerstone of the Department of Labor's efforts to promote work-life balance since President Clinton signed the legislation in 1993
- The best available evidence suggests that adopting flexible practices in the workplace potentially boosts productivity, improves morale, and benefits the economy



FMLA Works

- The Family and Medical Leave Act codified a simple and fundamental principle: Workers should not have to choose between the job they need and the family members they love and who need their care
- The significance of the FMLA is in its recognition that workers aren't just contributing to the success of a business, but away from their jobs they are contributing to the health and well-being of their families



Introduction to the FMLA

Topics of Discussion:

- Employer Coverage and Employee Eligibility
- Qualifying Reasons for Leave
- Amount of Leave
- Employer Rights and Responsibilities
- Employee Rights and Responsibilities
- Military Family Leave Provisions



Employer Coverage

[§ 825.104](#)

- Private sector employers with 50 or more employees
- Public Agencies
- Public and private elementary and secondary schools



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Employee Eligibility

§ 825.110

- Employed by covered employer
- Worked at least 12 months
- Have at least 1,250 hours of service during the 12 months before leave begins
- Employed at a work site with 50 employees within 75 miles



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Employee Eligibility – Airline Flight Crew Employees

[§ 825.801](#)

- An airline flight crew employee meets the hours of service requirement if, during the previous 12-month period, he or she:
 - has worked or been paid for not less than 60 percent of the applicable monthly guarantee; and
 - has worked or been paid for not less than 504 hours, not including personal commute time, or time spent on vacation, medical, or sick leave.



Qualifying Leave Reasons

[§ 825.112](#)

- Eligible employees may take FMLA leave:
 - For the birth or placement of a child for adoption or foster care
 - To care for a spouse, son, daughter, or parent with a serious health condition
 - For their own serious health condition

– Military Family Leave

- Because of a qualifying reason arising out of the covered active duty status of a military member who is the employee's spouse, son, daughter, or parent (qualifying exigency leave)
- To care for a covered servicemember with a serious injury or illness when the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember (military caregiver leave)



Qualifying Family Members

§ 825.122

- **Parent** - A biological, adoptive, step or foster father or mother, or someone who stood *in loco parentis* to the employee when the employee was a son or daughter. Parent for FMLA purposes does not include in-laws.
- **Spouse** - A husband or wife as defined or recognized in the state where the employee was married and includes individuals in a same-sex marriage or common law marriage.
- **Son or Daughter** - *For leave other than military family leave*, a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis* who is either under 18 years of age, or 18 or older and incapable of self-care because of a mental or physical disability.



Qualifying Leave Reasons – For the Birth or Placement of a Child

[§ 825.120-121](#)

- Both the mother and father are entitled to FMLA leave for the birth or placement of the child and/or to be with the healthy child after the birth or placement (bonding time)
- Employees may take FMLA leave before the actual birth, placement or adoption
- Leave must be completed by the end of the 12-month period beginning on the date of the birth or placement



Qualifying Leave Reasons – Serious Health Condition

[§ 825.113](#)

Illness, injury, impairment or physical or mental condition involving:

- Inpatient Care, or
- Continuing Treatment by a Health Care Provider



Serious Health Condition – Inpatient Care

[§ 825.114](#)

- An overnight stay in a hospital, hospice, or residential medical facility
- Includes any related incapacity or subsequent treatment



Serious Health Condition – Continuing Treatment

[§ 825.115](#)

Continuing Treatment by a Health Care Provider

- Incapacity Plus Treatment
- Pregnancy
- Chronic Conditions
- Permanent/Long-term Conditions
- Absence to Receive Multiple Treatments



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Continuing Treatment by a Health Care Provider

§ 825.115

Incapacity Plus Treatment

- Incapacity of more than three consecutive, full calendar days that involves either:
 - Treatment two times by HCP (first in-person visit within seven days, both visits within 30 days of first day of incapacity)
 - Treatment one time by HCP (in-person visit within seven days of first day of incapacity), followed by a regimen of continuing treatment (e.g., prescription medication)



Continuing Treatment by a Health Care Provider

[§ 825.115](#)

Pregnancy

- Incapacity due to pregnancy or prenatal care



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Continuing Treatment by a Health Care Provider

§ 825.115

Chronic Conditions

- Any period of incapacity or treatment due to a chronic serious health condition, which is defined as a condition that:
 - requires periodic visits (twice per year) to a health care provider for treatment
 - continues over an extended period of time
 - may cause episodic rather than continuing periods of incapacity



Continuing Treatment by a Health Care Provider

[§ 825.115](#)

Permanent/Long-Term Conditions

- A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective



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Continuing Treatment by a Health Care Provider

§ 825.115

Absence to Receive Multiple Treatments

- For restorative surgery after an accident or other injury, or
- For conditions that, if left untreated, would likely result in incapacity of more than three consecutive, full calendar days



Amount of Leave

[§ 825.200, 825.205 & 825.802](#)

- Employee's workweek is basis for entitlement
- Eligible employees may take up to **12 workweeks*** of FMLA leave:
 - for the birth or placement of a child for adoption or foster care;
 - to care for a spouse, son, daughter, or parent with a serious health condition; and
 - for the employee's own serious health condition.

* Eligible airline flight crew employees are entitled to 72 days of FMLA leave



Amount of Leave – Intermittent Leave

§ 825.202

- Employee is entitled to take intermittent or reduced schedule leave for:
 - Employee’s or qualifying family member’s serious health condition when the leave is medically necessary
 - Covered servicemember’s serious injury or illness when the leave is medically necessary
 - A qualifying exigency arising out of a military member’s covered active duty status
- Leave to bond with a child after the birth or placement must be taken as a continuous block of leave unless the employer agrees to allow intermittent or reduced schedule leave



Amount of Leave – Intermittent Leave

§ 825.205

- In calculating the amount of leave, employer must use the shortest increment the employer uses to account for other types of leave, provided it is not greater than one hour *
 - Shortest increment may vary during different times of day or shift
 - Required overtime not worked may count against an employee's FMLA entitlement
- * Special rules apply for calculating leave for airline flight crew employees



Amount of Leave – Special Rules

[§ 825.200 - 205](#)

- Physical impossibility
- Holidays
- Planned medical treatment
- Transfer to an alternative position
- Spouses may be limited to a combined total for certain leave reasons



12-Month Period

[§ 825.200](#)

Method determined by employer

- Calendar year
- Any fixed 12-month leave year
- A 12-month period measured forward
- A rolling 12-month period measured backward



Substitution of Paid Leave

§ 825.207

- “Substitution” means paid leave provided by the employer runs concurrently with unpaid FMLA leave and normal terms and conditions of paid leave policy apply
- Employees may choose, or employers may require, the substitution of accrued paid leave for unpaid FMLA leave
- Employee remains entitled to unpaid FMLA if procedural requirements for employer’s paid leave are not met



Substitution of Paid Leave – Limitations

§ 825.207

- Workers' compensation leave
 - may count against FMLA entitlement
 - “topping off” allowed if state law permits
- Disability leave
 - may count against FMLA entitlement
 - “topping off” allowed if state law permits
- Compensatory time off (public sector only)
 - may count against FMLA entitlement
 - subject to FLSA requirements



Employer Responsibilities

- Provide notice
- Maintain group health insurance
- Restore the employee to same or equivalent job and benefits
- Maintain records



Employer Responsibilities – Provide General Notice

§ 825.300

- Employers must inform employees of FMLA:
 - Post a General Notice, and
 - Provide General Notice in employee handbook or, if no handbook, distribute to new employees upon hire
- Electronic posting and distribution permitted
- Languages other than English required where significant portion of workforce not literate in English
- CMP for willful posting violation



Employer Responsibilities – Provide Notice of Eligibility

§ 825.300

- Within five business days of leave request (or knowledge that leave may be FMLA-qualifying)
- Eligibility determined on first instance of leave for qualifying reason in applicable 12-month leave year
- New notice for subsequent qualifying reason if eligibility status changes
- Provide a reason if employee is not eligible
- May be oral or in writing (optional WH-381)



Employer Responsibilities –

Provide Notice of Rights and Responsibilities

[§ 825.300](#)

- Provided when eligibility notice required
- Must be in writing (optional WH-381)
- Notice must include:
 - Statement that leave may be counted as FMLA
 - Applicable 12-month period for entitlement
 - Certification requirements
 - Substitution requirements
 - Arrangements for premium payments (and potential employee liability)
 - Status as “key” employee
 - Job restoration and maintenance of benefits rights



Employer Responsibilities – Provide Notice of Designation

§ 825.300

- Within five business days of having enough information to determine leave is FMLA-qualifying
- Once for each FMLA-qualifying reason per applicable 12-month period (additional notice if any changes in notice information)
- Include designation determination; substitution of paid leave; fitness for duty requirements
- Must be in writing (optional WH-382)
- If leave is determined not to be FMLA-qualifying, notice may be a simple written statement



Employer Responsibilities – Provide Notice of Designation

[§ 825.300 - .301](#)

- Employer must notify employee of the amount of leave counted against entitlement, if known; may be payroll notation
- If amount of leave is unknown (e.g., unforeseeable leave), employer must inform employee of amount of leave designated upon request (no more often than 30 days)
- Retroactive designation permitted provided that failure to timely designate does not cause harm to employee



Employer Responsibilities –

Maintain Group Health Plan Benefits

[§ 825.209](#)

- Group health plan benefits must be maintained throughout the leave period
- Same terms and conditions as if employee were continuously employed



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Employer Responsibilities –

Maintain Group Health Plan Benefits

[§ 825.210 - .213](#)

- Employee must pay his/her share of the premium
- Even if employee chooses not to retain coverage during leave, employer obligated to restore same coverage upon reinstatement
- In some circumstances, employee may be required to repay the employer's share of the premium if the employee does not return to work after leave



Employer Responsibilities – Job Restoration

[§ 825.214 - .219](#)

- Same or equivalent job
 - equivalent pay
 - equivalent benefits
 - equivalent terms and conditions
- Employee has no greater right to reinstatement than had the employee continued to work
- Bonuses predicated on specified goal may be denied if goal not met
- Key employee exception



Prohibited Employment Actions

[§ 825.220](#)

Employers cannot:

- interfere with, restrain or deny employees' FMLA rights
- discriminate or retaliate against an employee for having exercised FMLA rights
- discharge or in any other way discriminate against an employee because of involvement in any proceeding related to FMLA
- use the taking of FMLA leave as a negative factor in employment actions



Employer Responsibilities – Maintain Records

[§ 825.500](#)

- Basic payroll information
- Dates FMLA leave is taken
- Hours of leave if leave is taken in less than one full day
- Copies of leave notices
- Documents describing benefits/policies
- Premium payments
- Records of disputes



Employee Responsibilities

- Provide sufficient and timely notice of the need for leave
- If requested by the employer:
 - Provide certification to support the need for leave
 - Provide periodic status reports
 - Provide fitness-for-duty certification



Employee Responsibilities – Notice Requirements

[§ 825.302 - .303](#)

- Provide sufficient information to make employer aware of need for FMLA-qualifying leave
- Specifically reference the qualifying reason or the need for FMLA leave for subsequent requests for same reason
- Consult with employer regarding scheduling of planned medical treatment
- Comply with employer's usual and customary procedural requirements for requesting leave absent unusual circumstances



Employee Responsibilities – Notice Requirements

- Timing of Employee notice of need for leave:
- Foreseeable Leave - 30 days notice, or as soon as practicable
[§ 825.302](#)
- Unforeseeable Leave - as soon as practicable
[§ 825.303](#)



Employee Responsibilities – Provide Certification

[§ 825.305](#)

- Medical Certification for serious health condition (optional WH-380-E and 380-F)
 - Submit within fifteen calendar days
 - Employer must identify any deficiency in writing and provide seven days to cure
 - Annual certification may be required
 - Employee responsible for any cost



Employee Responsibilities – Provide Certification

[§ 825.307](#)

- Employer (**not** employee's direct supervisor) may contact health care provider to:
 - **Authenticate:** Verify that the information was completed and/or authorized by the health care provider; no additional information may be requested
 - **Clarify:** Understand handwriting or meaning of a response; no additional information may be requested beyond what is required by the certification form
- Second and third opinions (at employer's cost)
 - If employer questions the validity of the complete certification, the employer may require a second opinion
 - If the first and second opinions differ, employer may require a third opinion that is final and binding



Employee Responsibilities – Provide Certification

§ 825.308 & .313

- Recertification
 - No more often than every 30 days and with an absence
 - If the minimum duration on the certification is greater than 30 days, the employer must wait until the minimum duration expires
 - In all cases, may request every six months with an absence
 - More frequently than every 30 days if:
 - the employee requests an extension of leave, or
 - circumstances of the certification change **significantly**, or
 - employer receives information that casts doubt on the reason for leave
- Consequences of failing to provide certification
 - Employer may deny FMLA until certification is received



Employee Responsibilities – Provide Periodic Status Reports

[§ 825.311](#)

Employee must respond to employer's request for information about status and intent to return to work



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Employee Responsibilities – Fitness-for-Duty Certification

[§ 825.312](#)

- For an employee's own serious health condition, employers may require certification that the employee is able to resume work
 - Employer must have a uniformly-applied policy or practice of requiring fitness-for-duty certification for all similarly-situated employees
- If state or local law or collective bargaining agreement is in place, it governs the return to work
- Not permitted for intermittent or reduced schedule leave unless reasonable safety concerns exist
- Authentication and clarification
- Employee responsible for any cost



Other Issues

- Salaried employees:
[§ 825.206](#)
 - Deductions from certain “exempt” employees’ salaries
 - Deductions for employees paid overtime on a fluctuating workweek method
- Special rules for schools
[§ 825.600-.604](#)





MILITARY FAMILY LEAVE

Under the Family and Medical Leave Act



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FMLA Military Family Leave

The FMLA military family leave provisions include:

- **Qualifying exigency leave**, which provides up to **12 workweeks** of FMLA leave to help families manage their affairs when a military member has been deployed to a foreign country; and
- **Military caregiver leave**, which provides up to **26 workweeks** of FMLA leave to help families care for covered servicemembers with a serious injury or illness

Generally, FMLA rules and requirements continue to apply



Qualifying Exigency Leave

[§ 825.126](#)

Eligible employees may take up to **12 workweeks*** of FMLA leave because of a qualifying reason that arises 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"

- For qualifying exigency leave, son or daughter refers to a son or daughter of any age
- Leave for this reason counts against an employee's normal FMLA entitlement for other leave reasons within the 12-month leave year

* Eligible airline flight crew employees are entitled to 72 days



Qualifying Exigency Leave – Covered Active Duty

[§ 825.126](#)

- **Regular Armed Forces:**
 - duty during deployment of the member with the Armed Forces to a foreign country
- **Reserve components** of the Armed Forces (members of the National Guard and Reserves):
 - duty during deployment of the member with the Armed Forces to a foreign country under a call or order to active duty in support of a contingency operation



Qualifying Exigencies

§ 825.126

- Short-notice deployment (up to seven days)
- Military events and related activities
- Childcare and school activities
- Financial and legal arrangements
- Non-medical counseling
- Care of the military member's parent
- Rest and recuperation (up to fifteen days)
- Post-deployment activities (90-day period)
- Additional activities by agreement



Employee Responsibilities – Provide Certification

§ 825.309

- An employer may require an appropriate certification with:
 - a copy of the military member's active duty orders
 - a qualifying exigency certification (optional Form WH-384)
 - Statement of facts
 - Dates of leave
 - Frequency and duration of intermittent leave
 - Contact information for any third party meeting
- The employer may verify meetings with a third party and may contact DOD to verify the military member's covered active duty status



Military Caregiver Leave

[§ 825.127](#)

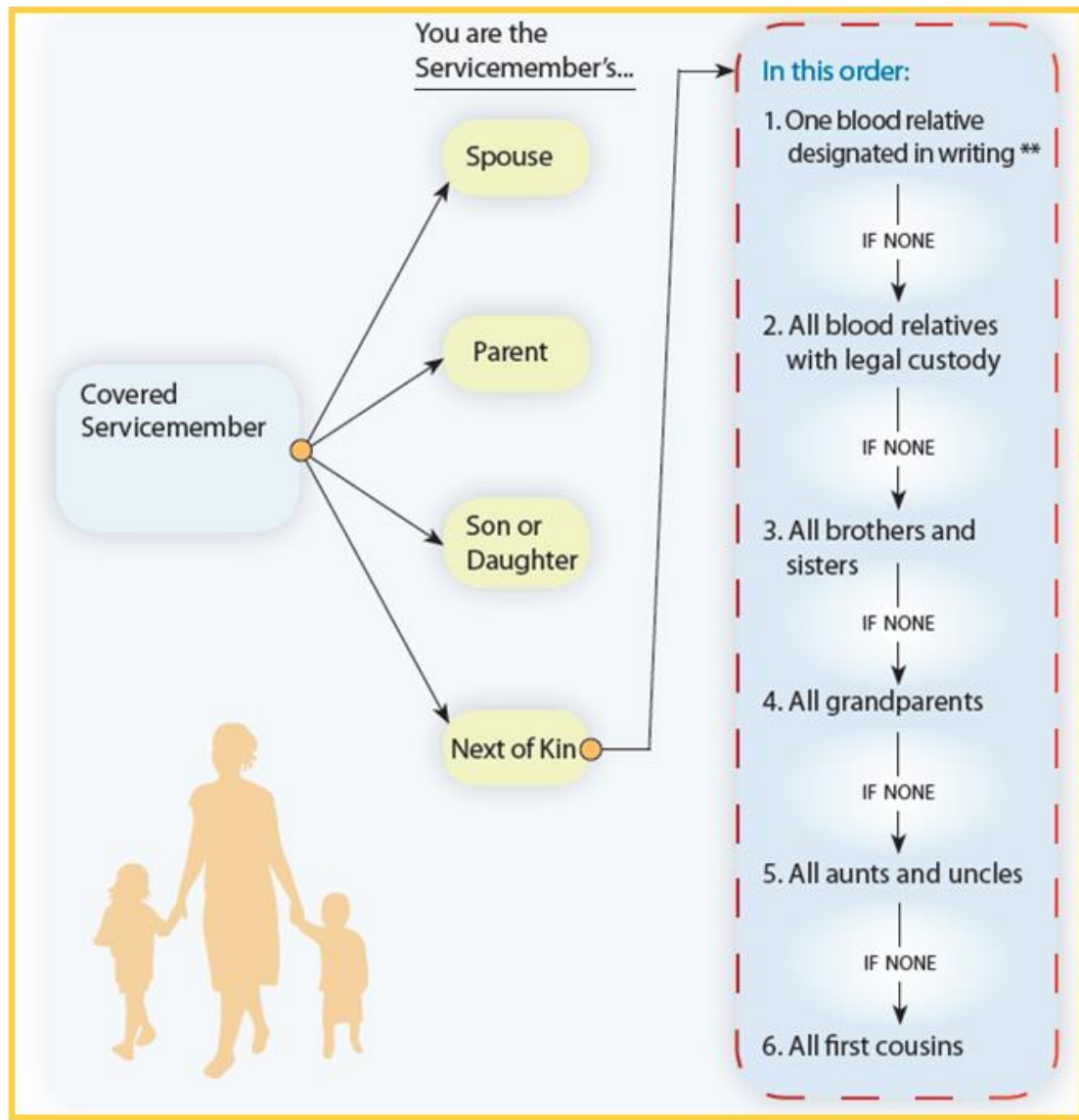
- Eligible employees may take up to 26 workweeks* of FMLA leave in a “single 12-month period” to care for a “covered servicemember” with a “serious injury or illness” if the employee is the covered servicemember’s spouse, parent, son, daughter, or next of kin
 - For military caregiver leave, son or daughter refers to a son or daughter of any age
 - All FMLA leave is limited to a combined total of 26 workweeks during the “single 12-month period”; no more than 12 workweeks can be taken for other leave reasons
- * Eligible airline flight crew employees are entitled to 156 days



Qualifying Family Relationships Under Military Caregiver Leave

§ 825.127

**Designated for purposes of military caregiver leave under the FMLA.



Covered Servicemember

[§ 825.127](#)

A **covered servicemember** may be:

- a current member of the Armed Forces; **OR**
- a veteran of the Armed Forces.



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Covered Current Servicemember

[§ 825.127](#)

A **current member of the Armed Forces**, including a member of the National Guard or Reserves:

- 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



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Current Servicemember – Serious Injury or Illness

[§ 825.127](#)

- A serious injury or illness is one that:
- was incurred by a servicemember in the line of duty on active duty; or
- existed before the servicemember's active duty and that was aggravated by service in the line of duty on active duty; and
- may cause the servicemember to be medically unfit to perform the duties of his or her office, grade, rank, or rating



Employee Responsibilities – Certification for a Current Servicemember

[§ 825.310](#)

- An employer may require that leave to care for a covered servicemember be supported by a certification completed by an authorized health care provider (optional WH-385), or an Invitational Travel Order (ITO) or Invitational Travel Authorization (ITA)
- Authentication and clarification
- Limited second and third opinions



Covered Servicemember – Veteran

[§ 825.127](#)

- A veteran of the Armed Forces is a covered servicemember if he or she:
 - is undergoing medical treatment, recuperation, or therapy for a serious injury or illness; and
 - was discharged under conditions other than dishonorable within the five-year period before the employee first takes military caregiver leave*
- * Special rules may apply if the servicemember was discharged before March 8, 2013



Veteran Serious Injury or Illness

[§ 825.127](#)

- An injury or illness that was incurred or aggravated by service in the line of duty on active duty in the Armed Forces, that manifested before or after the servicemember became a veteran, and that is either:
 1. a continuation of a serious injury or illness that was incurred or aggravated when the veteran was a member of the Armed Forces; or



Veteran Serious Injury or Illness

[§ 825.127](#)

(continued)

- 2) a condition for which the veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater (the rating may be based on multiple conditions); *or*
- 3) a condition that substantially impairs the veteran's ability to work because of a disability related to military service, or would do so absent treatment; *or*
- 4) an injury that is the basis for the veteran's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers



Employee Responsibilities – Certification for a Veteran

§ 825.310

- An employer may require that leave to care for a veteran be supported by a certification completed by an authorized health care provider (optional WH-385-V)
- Authentication and clarification
- Limited second and third opinions



Employee Responsibilities – Certification for a Veteran

§ 825.310

- An employee may submit a copy of a VASRD rating determination or enrollment documentation from the VA Program of Comprehensive Assistance for Family Caregivers to support the veteran's serious injury or illness
- Additional information may be needed to establish the other requirements for a complete certification such as:
 - confirmation of family relationship;
 - documentation of discharge date



Military Caregiver Leave – Application of Leave

[§ 825.127](#)

- “Single 12-month period”
- Per covered servicemember, per injury
- Limitations on leave
 - 26 workweeks for all qualifying reasons
 - Designation of caregiver leave
 - Spouses working for same employer



FMLA Enforcement Mechanisms

§ 825.400

- To enforce FMLA rights, employees may:
 - File a complaint with Wage and Hour Division
 - File a private lawsuit (Section 107(a))
- Action must be taken within two years after the last action which the employee contends was in violation of the Act, or three years if the violation was willful



FMLA Compliance Assistance Materials

- Title I of the FMLA, as amended (29 U.S.C. 2601—2654)
- The Regulations (29 C.F.R. Part 825)
- The Employee’s Guide to the FMLA
- The Employee’s Guide to Military Family Leave under the FMLA
- FMLA Forms
- FMLA Fact Sheets
- FMLA Poster (WH-1420)
- FMLA Frequently Asked Questions
- FMLA elaws Advisor



Additional Information

- **Visit the WHD homepage at:**
<http://www.wagehour.dol.gov>
- **Call the WHD toll-free information and helpline at**
1-866-4US-WAGE (1-866-487-9243)
- **Call or visit the nearest Wage and Hour Division Office**

