

Michigan State University
Human Resources
Family and Medical Leave Act Final Rule 2009

Italic/Bold indicates changes.

2008 amendments to the FMLA extended the FMLA leave protection and other rights to situations where eligible employees need leave for (1) qualifying exigencies related to a family member's call up for, or service on, active military duty or (2) care for a family member who has or is recuperating from a serious illness or injury incurred in military service, including where the employee is next of kin to the service member.

New Forms

Form 1: Notice of Eligibility, Rights and Responsibilities, and Designation Notice

In general, to be eligible an employee must have worked for an employer for at least 12 months, and have worked at least 1,250 hours in the 12 months preceding the leave. This form is required by the University and provides employees with the information required by 29 C.F.R 825.300(b), which must be provided within five business days of the employee notifying the employer of the need for FMLA leave.

Form 2: Certification of Health Care Provider for Employee's Serious Health Condition

Michigan State University requires an employee seeking FMLA protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee's health care provider.

Form 3: Certification of Health Care Provider for Family Member's Serious Health Condition

Michigan State University requires an employee seeking FMLA protections because of a need for leave to care for a covered family member with a serious health condition to submit a medical certification issued by the health care provider of the covered family member.

Form 4: Certification of Qualifying Exigency for Military Family Leave

Michigan State University requires an employee seeking FMLA leave due to a qualifying exigency to submit a certification.

Form 5: Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave

Michigan State University requires an employee seeking FMLA protections because of a need for leave to care for a covered Servicemember with a serious health condition to submit a medical certification issued by the health care provider of the covered family member.

ELIGIBILITY:

Staff employed at the University for a total of 12 months (may have been intermittent employment) and having at least 1,250 work hours during the 12-month period immediately preceding the commencement of FMLA leave. *The Department of Labor (DOL) has revised this regulation to provide that a service break of seven years or more need not be counted in determining whether an employee has been employed for at least 12 months. *Exception for breaks caused by military leave, MSU must have consistently applied policy to count time prior to break in service.*

IS “CALLING IN SICK” SUFFICIENT NOTICE FOR FMLA:

Calling in “sick” without providing more information will not be considered sufficient notice to trigger an employer’s obligations under the Act. The employer will be expected to obtain any additional required information through informal means. An employee has an obligation to respond to an employer’s questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.

WHAT INFORMATION MUST BE PROVIDED TO EMPLOYEE:

Once the employer is aware the leave is being taken for an FMLA-qualifying reason, the employer must promptly (*within five [5] business days*, absent extenuating circumstances) notify the employee the leave will be designated as FMLA leave. The employer's notification to the employee of the FMLA designation may be oral, but must be confirmed in writing by using the required Notice of Eligibility, Rights and Responsibilities, and Designation Notice and to explain the specific expectations and obligations of the employee and any consequence of failure to meet these obligations. This form is required for the use of FMLA for the employee, covered family member, qualifying exigency and military caregiver leave. If the FMLA leave being requested is for the purpose of adoption or providing foster care, the employee must provide documentation from the granting agency.

NOTICE REQUIREMENT AND RETROACTIVE DESIGNATION:

If an employer does not designate leave as required by the act, the employer may retroactively designate leave as FMLA leave with appropriate notice to the employee as required by the act provided that the employer’s failure to timely designate leave does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, an employer and an employee can mutually agree that leave be retroactively designated as FMLA leave.

WHAT RECOURSE DO DEPARTMENTS HAVE IF EMPLOYEE FAILS TO PROVIDE 30 DAYS NOTICE:

An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a

covered service member. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable.

For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement for adoption. For foreseeable leave due to a qualifying exigency notice must be provided as soon as practicable, regardless of how far in advance such leave is foreseeable.

Whether FMLA leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee shall advise the employer as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. In those cases where the employee is required to provide at least 30 days notice of foreseeable leave and does not do so, the employee shall explain the reasons why such notice was not practicable upon a request from the employer for such information.

As soon as practicable means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. When an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. In all cases, however, the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances.

HEALTH CARE PROVIDER:

A health care provider is:

- a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the state in which the doctor practices;
- podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the state and performing within the scope of their practice as defined under state law;
- nurse practitioners, nurse-midwives and clinical social workers who are authorized to practice under state law and who are performing within the scope of their practice as defined under state law;
- ***physician's assistants who are licensed and are performing within the scope of their practice as defined by state law***
- Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts; and
- any health care provider from whom the University's health care plans will accept certification of the existence of a serious health condition.

SERIOUS HEALTH CONDITION:

- A. For purposes of FMLA, serious health condition entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:
1. Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due

- to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or
2. Continuing treatment by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:
 - a. A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
 - i. Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist under orders of or on referral by, a health care provider); or
 1. Treatment, ***which requires an in-patient visit occurring within seven days of the first day of incapacity***, by a health care provider, on at least one occasion which results in a regimen of continuing treatment (***defined as two or more times within a 30 day period unless extenuating circumstance exist***) under the supervision of the health care provider.
 - ii. Any period of incapacity due to pregnancy, or for prenatal care.
 - iii. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:
 - a. Requires periodic visits (***defined as two or more treatments a year***) for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;
 - b. Continues over an extended period of time (including recurring episodes of a single underlying condition); and
 - c. May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).
 - iv. A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.
 - v. Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy,

radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).

- B. Treatment for purposes of paragraph A. of this section includes, but is not limited to, examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. Under paragraph A. (2) (i) (b), a regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.
- C. Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not serious health conditions unless inpatient hospital care is required or unless complications develop.

Ordinarily, unless complications arise, the following are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave:

- the common cold,
- the flu,
- ear aches,
- upset stomach,
- minor headaches,
- minor ulcers,
- routine dental problems, or
- periodontal disease.

Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness may be a serious health condition, but only if all the conditions of this section are met.

- D. Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave. ***However, nothing in the FMLA protects the employee from discipline, including termination for the violation of an established, consistently enforced substance abuse policy.***
- E. Absences attributable to incapacity under paragraphs A. (2) (ii) or (iii) qualify for FMLA leave even though the employee or the immediate family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

F. Departments must require medical certification of a serious health condition

LIMITATIONS ON USING INTERMITTENT OR REDUCED LEAVE FMLA FOR BIRTH OR ADOPTION OF CHILD:

Special issues concern FMLA leave entitlement for the birth or adoption of a child. The employee must conclude his or her leave within 12 months of the birth or placement. Leave taken to care for a newborn child or a newly adopted child does not require illness, but an employee may not take the leave on an intermittent or reduced leave schedule basis unless otherwise agreed upon by the employer.

CARING FOR AN ADULT CHILD QUALIFIES FOR FMLA WHEN:

- Care for an adult child will qualify only where the child is incapable of self-care, requires active assistance or supervision, and meets the test for a “disability” as defined by the Americans With Disabilities Act (“ADA”). An individual is incapable of self care when he or she requires active assistance or supervision to provide daily self care in 3 or more “activities of daily living” such as caring for one’s hygiene, bathing, dressing, or eating or in “instrumental activities of daily living,” including cooking, paying bills, and maintaining a residence.
- *Qualifying exigencies related to a family members call up for, or service on, active military duty*
- *Military caregiver leave related to care for a family member who has, or is recuperating, from a serious illness or injury incurred in military service, including where the employee is next of kin to the service member.*

CERTIFICATIONS

TIME LIMITS FOR RETURNING CERTIFICATION:

A department must require that an employee's request for leave to care for her/his seriously-ill spouse/eligible partner, son, daughter, parent, or for the employee's own serious health condition be supported by medical certification issued by the health care provider. A qualifying exigency or military caregiver leave must also be supported by certification. The certification describes the maximum amount of information that can be requested of a health care provider. The department must allow at least 15 calendar days after notifying the employee that certification is required. At the time a department requests certification, they must advise an employee of the consequences for failing to provide adequate certification. If the certification is incomplete or insufficient, the employer must state in writing what additional information is necessary to satisfy the certification requirement. *The employer must then give the employee seven calendar days to cure the deficiency. If the employee fails to do so, the employer may deny the leave.*

CERTIFICATION IS INCOMPLETE:

The university requires the employee to provide a complete and sufficient certification to the employer. *The employer shall advise an employee whenever the employer finds a certification incomplete or insufficient, and shall state in writing what additional information is necessary to make the certification complete and sufficient using the Notice of Eligibility and Rights of Responsibilities and Designation Notice. A certification is considered incomplete if the*

employer receives a certification, but one or more of the applicable entries have not been completed. The employee will have seven (7) days to cure any deficiencies.

CERTIFICATION IS INSUFFICIENT:

The certification is considered insufficient if the department receives a complete certification, but the information provided is vague, ambiguous, or non-responsive. *The employer must provide the employee with seven (7) calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency. If the deficiencies specified by the employer are not cured in the resubmitted certification, the employer may deny the taking of FMLA leave.*

CERTIFICATION NEEDS AUTHENTICATION:

If a department questions the authenticity of a medical certification provided under the FMLA, it may not request additional information from that health care provider, *but the new revisions allow the MSU Human Resources FMLA Coordinator to contact the medical provider directly. No additional medical information can be requested, and the employee's permission is not needed.*

CERTIFICATION NEEDS CLARIFICATION:

The new revisions allow the MSU Human Resources FMLA Coordinator to contact the medical provider directly. "Clarification" refers to requests to decipher handwriting or to understand the meaning of a response. Again, no additional medical information can be obtained. An employee can choose not to allow the employer to seek clarification, but then the employer can deny the leave if the certification is unclear.

WHEN IS A RECERTIFICATION CONSIDERED A "NEW" CERTIFICATION:

The revised regulations allow an employer to seek recertification every six months even if the nature of the condition is such that it could last longer than that. In addition, the DOL has ruled that an employer may ask for new certification (as opposed to recertification) after one year of eligibility. At the time, the employer may request new medical certification, not simply recertification, and can seek a second or third medical opinion. The employer may also reassess eligibility, such as whether the employee meets the 1,250 hour requirement.

RETURN TO WORK REQUIREMENTS:

A department may require an employee to report periodically on her/his status and intent to return to work. This reporting requirement may not be discriminatory and must take into account all of the relevant facts and circumstances related to the employee's leave situation.

In situations where an employee discovers after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary, the employee should give reasonable notice (a minimum of two days) to the employer where early return to work is foreseeable. An employee may not be required to take more leave than necessary to address the qualifying circumstances.

As a condition of restoring an employee from FMLA leave occasioned by employee's own health condition, the department must require certification from her/his health care provider that the employee is able to resume work, *and can perform the essential functions of the job. The MSU*

Human Resource FMLA Coordinator is allowed to contact the doctor for clarification or authentication under the same terms as apply for the original certification. However, no second or third fitness-for-duty certifications may be required. This policy or practice must be uniformly applied to all similarly-situated employees (i.e., same occupation, same serious health condition) and must comply with state or local laws, terms of a Collective Bargaining Agreement, or requirements of ADA. When clarification of a fitness-for-duty certification is determined to be necessary, an employee's return to work cannot be delayed more than two days while inquiry is made.

NEW MILITARY LEAVE

DEFINITION OF “QUALIFIED EXIGENCY”:

The amendments to the FMLA introduce a new type of leave which has nothing to do with a person’s serious health condition or the birth or adoption of a child, but instead is for “qualifying exigencies” arising out of the military service of a covered family member. This leave is limited to 12 weeks in the normal FMLA-12 month period. Certification is required for leave taken due to a qualifying exigency.

Employees are eligible to take FMLA leave because of a qualifying exigency when the covered military member is on active duty or call to active duty status in support of a contingency operation as either a member of the reserve components or a retired member of the regular Armed Forces or Reserves. An employee whose family member is on active duty status in support of a contingency operation as a member of the Regular Armed Forces is not eligible to take leave because of a qualifying exigency.

“Qualified exigencies” are now defined to include the following:

- 1. Short-notice deployment. Issues that arise from the fact that a covered military member is called to active duty with notice of seven days or less prior to deployment. This leave can be taken during the seven-day period only.*
- 2. Military events and related activities. Leave to attend official military events related to active duty, or to attend family support or assistance programs and informational briefings related to the call to active duty.*
- 3. Childcare and school activities. Leave to arrange for alternative child care for a child (as defined by the FMLA) of a covered servicemember, to provide childcare on an emergency basis (but not a routine, regular, or every day basis), to enroll a child of a covered servicemember in school, or to attend school meetings for the child of a covered servicemember where the leave is necessitated by the active duty or call to active duty of the covered service member.*
- 4. Financial and legal arrangements. Leave to make financial or legal arrangements to address the covered service member’s absence for military duty, or to act as the covered servicemember’s representative for purposes of obtaining military service benefits. Leave can only be taken to obtain military service benefits while the servicemember is away on active duty or within 90 days of termination of that active duty.*

5. *Counseling. Leave to attend counseling by someone other than a health care provider for the employee, the covered servicemember, or a child of the covered servicemember, provided that the need for counseling arises from the military service.*
6. *Rest and recuperation. Leave to spend time with a covered servicemember who is on a short-term, temporary, rest and recuperation leave during the period of deployment. This leave is limited to five days for each military rest and recuperation visit.*
7. *Post-deployment activities. Leave to attend post-deployment functions, such as arrival ceremonies or reintegration briefings, that occur within 90 days following the termination of active duty status, or to address issues that arise from the death of the covered servicemember, such as making funeral arrangements.*
8. *“Additional activities”. These are not defined by either the FMLA or the regulations. The regulations state that such leave is allowed “to address other events which arise out of the covered military member’s active duty or call to active duty status provided that the employer and the employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave”. In other words, granting leave for “qualified exigencies” for purposes other than those stated in the above is at the discretion of the employer, though employers should keep in mind that courts and the DOL will give eligible employees the benefit of the doubt in coverage and enforcement disputes.*

Where the employee’s “qualifying exigency” involves meeting with a 3rd party, such as for counseling, the employer may contact the 3rd party without the employee’s permission to verify the appointment and the nature of the meeting. The employer may also contact the Department of Defense, again without the employee’s permission, to verify the employee’s family member’s active duty or call to active duty status.

DEFINITION OF MILITARY CAREGIVER LEAVE:

Leave may be taken for a covered service member with a “serious injury or illness”. “Serious injury or illness” is defined as an injury or illness that is incurred in the line of duty on active duty that may render the service member medically unfit to perform the duties of his or her office, grade, rank or rating. Leave can be taken for a covered service member (a) who is on the temporary disability retired list, (b) who is undergoing medical treatment, recuperation, or therapy for the serious illness or injury; or (c) who is assigned to a military medical treatment facility as an outpatient or is otherwise receiving outpatient care at a unit established for members of the armed forces. This FMLA leave does not apply to care for former members of the armed forces who are on the permanent disability list.

An employee caring for a covered service member with a serious illness or injury is eligible for up to 26 weeks of FMLA leave within a 12 month period. The 12-month period is not defined by the employer under a calendar fixed or rolling year, but rather is defined as a rolling year beginning on the first day of leave. If the individual needs to care for more than one servicemember or the original service member has a subsequent injury, the individual may be entitled to take more than one period of 26 weeks of leave, but the individual cannot take more than 26 weeks for the same illness or injury for a single servicemember. Regular FMLA (i.e., for the individual’s own serious health condition or for the care of a non-service member) is

still limited to 12 weeks, and “qualified exigency” leave does not qualify for the 26 weeks servicemember caregiver leave.

DOCUMENTATION THAT MUST BE ACCEPTED FOR MILITARY CAREGIVER LEAVE:

MSU must accept from an eligible employee requesting such leave military forms known as “ITOs” and “ITAs”. Known as “invitational travel orders” and “invitational travel authorizations,” ITOs and ITAs are issued to permit an injured servicemember’s family members to travel to join the service member at his or her bedside. An employee who submits an ITO or an ITA to support his request for caregiver leave may not be required to provide any additional certification during the time period specified in the ITO/ITA. If the employee seeks leave for the same purpose beyond the time period specified in the ITO/ITA, however, the employer may then require the employee to support such further leave with the Military Caregiver Form. ITOs/ITAs are subject to authentication and clarification, but not recertification or 2nd/3rd opinions. When an employee requesting leave submits an ITO/ITA, the employer may also require the employee to confirm his family relationship to the covered service member.

DEFINITION OF “NEXT OF KIN”:

Family members of the covered service members include, along with the parent, spouse, or child already covered by the FMLA, “next of kin” which is defined as the servicemember’s nearest blood relative. Generally, the service member will designate next of kin. However, where the service member has not done so, multiple individuals may meet the definition.

COORDINATING THE 480 HOURS (12 WEEKS) FMLA WITH THE (26 WEEKS) OF FMLA MILITARY CAREGIVER LEAVE:

An eligible employee is entitled to a combined total of 26 workweeks of leave for any FMLA-qualifying reason during the “single 12-month period”. The Military Care Giver 12-month period is defined as beginning on the first day the eligible employee takes FMLA to care for a covered servicemember 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 (fiscal year, July 1). If an eligible employee does not take all of his or her 26 workweeks of leave entitlement to care for a covered service member during this “single 12-month period,” the remaining part of his or her 26 workweeks of leave entitlement to care for the covered servicemember is forfeited. Thus, 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.