

GUIDE TO THE FAMILY AND MEDICAL LEAVE ACT for Nonjudicial Employees of the Unified Court System

Eligibility, Rights and Responsibilities (Revised 2013)

The federal Family and Medical Leave Act (“FMLA”) entitles eligible employees to take unpaid leave for specified family and medical reasons. FMLA leave generally runs concurrently with the paid or unpaid leaves available to UCS employees under the collective Agreements or Rules of the Chief Judge.

This Guide highlights important provisions of the FMLA for UCS employees, supervisors and court managers.

~The United States Department of Labor has issued regulations expanding the exigency and military caregiver leave provisions of the FMLA. The applicable changes are listed below in a bold italic typeface.

Employee Eligibility

To be eligible for FMLA benefits you must: (1) have worked for the UCS for at least 12 cumulative months prior to commencement of the leave and (2) completed at least 1,250 hours of paid service during the 12 months prior to the start of the FMLA leave. Paid service includes time worked, time charged to accruals (including sick leave bank credits), overtime worked, military leave, statutory workers’ compensation and contractual workers’ compensation leave (i.e., leave with pay for a line-of-duty injury).

~Note that under the federal Uniformed Services Employment and Reemployment Act (“USERRA”), service members who return to work after serving in the National Guard or Reserves are eligible to receive the same benefits of employment that they would have obtained had they been continuously employed. One such benefit is FMLA leave. Therefore, in determining eligibility under the FMLA, these employees must be given credit for the months they would have been working and the hours-of-service they would have performed, but for their military service.

Leave Entitlement

If eligible, you are entitled to up to a total of 12 weeks of leave during each calendar year for one or more of the following reasons:

- ▶ for birth of a son or daughter, and to care for the newborn child;
- ▶ for placement with you of a child for adoption or foster care, and to care for the newly-placed child;
- ▶ to care for your spouse, child or parent (but not a parent-in-law) with a serious health condition;
- ▶ when you are unable to work because of a serious health condition (including work-related injury or illness); and
- ▶ because of a “qualifying exigency” arising out of the fact that your spouse, son, daughter, or parent, is on active duty or under a call to active duty status in the National Guard or reserves in support of a contingency operation. *Qualifying exigencies* must involve one of the following: short-notice deployment; military events and activities; child care and school activities; financial and legal arrangements; counseling; rest and recuperation; post-deployment activities; and additional activities that arise out of the military member’s covered active duty or call to covered active duty.

~Qualifying exigency leave is now available to eligible employees with family members serving in the Regular Armed Forces.

~Eligible employees may also take “parental care” qualifying exigency leave to care for a military member’s parent who is incapable of self-care necessitated by the military member’s active duty or call to covered active duty.

Leave Entitlement-Military Caregiver Leave

If eligible, you are entitled to take up to 26 weeks of FMLA leave in a single 12-month period to care for your spouse, son, daughter, parent or next of kin (“covered service member”) with a serious injury or illness.

For purposes other than “qualifying exigency” leave or “military caregiver leave,” the term “son or daughter” does not include individuals age 18 or over unless they are “incapable of self-care” because of a mental or physical disability that limits one or “more major life activities.”

FMLA 12-Week Benefit

Spouses employed by the UCS are jointly entitled to a combined total of 12 weeks of family leave for the following reasons:

- ▶ birth and care of a child;
- ▶ placement of a child for adoption or foster care, and to care for the newly-placed child;
- ▶ to care for a parent (but not a parent-in-law) who has a serious health condition; and
- ▶ qualifying exigency.

Leave to care for a newborn child or for a newly-placed child must conclude within 12 months after the birth or placement.

Under some circumstances, FMLA leave may be taken intermittently, either in blocks of time or by reducing your normal work schedule. If FMLA leave is for birth or for adoption or foster care placement, use of intermittent leave is subject to UCS approval.

FMLA leave may be taken intermittently whenever medically necessary to care for a seriously ill family member or because you are seriously ill and unable to

work. You also may take FMLA leave to receive “continuing treatment by a health care provider,” including absences for therapy treatments such as those ordered by a doctor for physical therapy after a hospital stay.

If you need intermittent/reduced schedule leave for foreseeable medical treatment, you must work with the UCS to schedule the leave so as not to unduly disrupt operations, subject to the approval of your health care provider.

Existing requirements, such as the requirement to call in when absent due to illness continue to apply while you are on FMLA leave.

If you are unable to return to work and have exhausted your FMLA leave, your FMLA benefits cease.

Definitions Applicable to Leave for a Qualifying Exigency

Eligible Employee is defined as an employee who meets the normal service eligibility requirements for FMLA leave and is the spouse, parent, son or daughter of a service member who meets the definition of a *covered military member*.

Covered Military Member is defined as an employee’s spouse, son, daughter or parent who is a member of the National Guard or Reserves serving on *active duty*, or has been notified of an impending call or order to *active duty*, *in support of a contingency operation*.

~The definition of a covered military member now includes relatives who are members of the Regular Armed Forces.

~In order to take qualifying exigency leave, a covered military member’s deployment must now be to a foreign country.

Qualifying Exigencies are defined as follows:

1. **Short-Notice Deployment** means a *covered military member* is notified of an impending call or order to active duty seven or fewer days from the date of deployment. Leave under this provision is limited to seven days beginning on the date of notification.

2. **Military Events and Activities** means attendance at any official ceremony, program or event sponsored by the military that is related to the *covered military member's* active duty or call to active duty.

3. **Childcare and School Activities** means those activities necessitated by the *covered military member's* active duty or the call to active duty, including arranging alternative childcare, providing childcare on an urgent (but not routine, regular or everyday) basis, enrolling or transferring a child in a new school or day care facility, or to attend meetings with schools or day care staff due to circumstances arising from the deployment of the *covered military member*.

4. **Financial and Legal Arrangements** means to make or update financial or legal arrangements and to act as the *covered military member's* representative with respect to issues involving military service benefits.

5. **Counseling** means to attend counseling because of the *covered military member's* active duty or call to active duty status.

6. **Rest and Recuperation** means to spend time with a *covered military member* who is on a short-term, temporary rest and recuperation leave during the period of deployment.

~An eligible employee may now take up to a maximum of fifteen calendar days for each instance of rest and recuperation.

7. **Post-Deployment Activities** means to attend certain post-deployment activities, such as arrival ceremonies, reintegration briefings and to address issues arising from the death of a *covered military member* while on active duty status.

8. **Additional Activities** means those activities arising out of the active duty, provided that the employer and employee agree that the leave qualifies as an exigency and also agree on the timing and duration of leave.

~Parental Care means leave to care for a military member's parent who is incapable of self-care necessitated by the military member's active duty or call

to covered active duty. Leave under this provision 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.

Serious Health Condition

A "serious health condition" is an illness, injury, impairment or physical or mental condition that involves:

- ▶ any period of incapacity or treatment connected with inpatient care (*i.e.*, an overnight stay) in a hospital, hospice or residential medical care facility; or
- ▶ a period of incapacity requiring absence of more than three calendar days from work, school or other regular daily activities that also involve continuing treatment by (or under the supervision of) a health care provider; or
- ▶ any period of incapacity (or treatment therefor) due to a chronic serious health condition (*e.g.*, asthma, diabetes, epilepsy, *etc.*); or
- ▶ a period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (*e.g.*, Alzheimer's, stroke, terminal diseases, *etc.*); or
- ▶ any absences to receive multiple treatments (including any period of recovery therefrom) by, or on referral by, a health care provider for a condition that likely would result in incapacity if left untreated (*e.g.*, chemotherapy, physical therapy, dialysis, *etc.*); or
- ▶ disability due to pregnancy and childbirth and absences for pre-natal care.

Military Caregiver Leave Benefit

The single 12-month period for up to 26 weeks of leave is measured forward from the date the *military caregiver leave* begins.

Any *military caregiver leave* not taken within the 12-month period is forfeited.

During the designated 12-month period, you are limited to a combined total (military caregiver leave and all other categories of FMLA leave) of 26 weeks of FMLA. You may not, however, take more than 12 weeks of FMLA leave for reasons other than for *military caregiver leave*. For example, you may not take more than 12 weeks of FMLA to care for a newborn child during the designated 12-month period, even if you used fewer than 14 weeks of FMLA leave to care for a *covered service member*. Once you exhaust the 26-week entitlement, you may not take any additional FMLA leave for any reason until the “single” 12-month period ends.

Spouses employed by the UCS are jointly entitled to a combined total of 26-weeks of *military caregiver leave* in a single 12-month period.

Definitions Applicable to Military Caregiver Leave

Eligible Employee is defined as an employee who meets the general eligibility requirements for FMLA leave and is the spouse, parent, son, daughter or next of kin of a *covered service member*.

Covered Service member is defined as a current member of the Regular Armed Forces, National Guard or Reserves, or a member of the Regular Armed Forces, the National Guard or Reserves who is on the temporary disability retired list who has a serious injury or illness incurred in the line of duty on active duty for which he or she is undergoing medical treatment, recuperation, therapy, or is otherwise in outpatient status or on the temporary disability retired list. *Covered service member* does not include those on the permanent disability list.

~ The definition of covered service member now includes covered veterans who are undergoing medical treatment, recuperation, or therapy for a serious injury or illness.

~ A covered veteran is an individual who was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date FMLA leave is taken to care for the covered veteran. Note that the period between October 28, 2009 and March 8, 2013 is excluded when determining the five-year period for covered veteran status.

Serious Injury or Illness is defined as an injury or illness incurred by a *covered service member* in the line of active duty that may render the service member medically unfit to perform the duties of his or her military office, grade, rank or rating.

~For current service members, the definition of a serious injury or illness now includes an injury or illness that existed before the beginning of the military member’s active duty and was aggravated by service in the line of active duty.

~Serious Injury or Illness, in the case of a covered veteran, is defined as an injury or illness that was incurred or aggravated by the member in the line of active duty in the Armed Forces and manifested itself before or after the member became a veteran, and is either: (i) 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 service member unable to perform the duties of the service member’s office, grade, rank, or rating; (ii) a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater and the need for military caregiver leave is related to that condition; (iii) a physical or mental condition that substantially impairs the covered veteran’s ability to secure a gainful occupation because of a disability or disabilities related to military service, or would do so absent treatment; (iv) an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veteran’s Affairs Program of Comprehensive Assistance for Family Caregivers.

Next of Kin is defined as the nearest blood relative other than the *covered service member’s* spouse, parent, son or daughter, in the following priority: blood relatives who have been granted legal custody, brothers and sisters, grandparents, aunts and uncles, first cousins; unless the

service member has specifically designated in writing another blood relative for purposes of *military caregiver leave* under the FMLA.

If You Need FMLA Leave

Present procedures for making leave requests may be used in connection with requesting FMLA leave, *e.g.*, a request for FMLA leave with or without pay in connection with childbirth and care for the newborn child would be made on a UCS-48 and be processed according to the usual procedure for processing requests for child care leaves under the collective Agreements or Rules of the Chief Judge. Be sure to indicate whether you plan to use your leave credits to remain on the payroll or are opting to go on FMLA leave without pay.

If you have questions about how to request FMLA leave, contact your administrative office.

If you want to use FMLA leave, you will be required to provide:

- ▶ 30-day advance notice of the need to take FMLA leave if the need is foreseeable;
- ▶ notice “as soon as practicable” when the need to take FMLA leave is not foreseeable (“as soon as practicable” generally means at least verbal notice to the appropriate authority within one or two workdays of learning of the need to take FMLA leave);
- ▶ sufficient information for the UCS to understand that the leave is for a FMLA-qualifying reason (you need not specifically mention FMLA, except if you are seeking FMLA leave that has already been previously taken or certified, in this instance, you must *specifically reference* either the qualifying reason for leave or need for FMLA leave); and
- ▶ where the UCS was not made aware that you were absent for FMLA reasons and you want the leave counted as FMLA leave, timely notice (no later than two workdays of returning to work) that the leave was taken for an FMLA-qualifying reason.

If you do not provide the UCS with timely notification that the absence was for an FMLA purpose, you may not later assert FMLA protections for an absence.

During your FMLA leave, you may be required to provide periodic reports on your status and intent to return to work after the leave.

Certification

Medical Certification for Employee’s Serious Health Condition

The UCS may require that you provide medical certification for your serious health condition. You will have 15 calendar days to provide the certification using the “Certification of Health Care Provider for Employee’s Serious Health Condition” form (WH-380-E).

You may be required to obtain a second or third medical opinion/certification at the UCS’s expense. If you have been on FMLA leave due to a serious health condition, you may be required to provide medical certification that you are fit for duty prior to, and as a condition of, your return to work.

Medical Certification for Family Member’s Serious Health Condition

The UCS may require that you provide medical certification for the family member’s serious health condition. You will have 15 calendar days to provide the certification using the “Certification of Health Care Provider for Family Member’s Serious Health Condition” form (WH-380-F).

Medical Certification for Military Caregiver Leave

The UCS may require that you provide medical certification for the serious injury or illness of the “covered service member.” You will have 15 calendar days to provide the certification using the “Certification for Serious Injury or Illness of Covered Service member” form (WH-385).

~The WH-385 form has been modified to reflect recent changes to the regulations. In the case where military caregiver leave is requested to care for family members,

who are veterans, use the new “Certification of a Serious Injury or Illness of a Veteran for Military Caregiver Leave” (WH-385-V) form.

Certification of Qualifying Exigency Leave

The UCS may require certification of the *Qualifying Exigency*. You will have 15 calendar days to provide the certification using the “Certification of Qualifying Exigency for Military Family Leave” form (WH-384).

~The WH-384 form has been modified to reflect changes to the regulations.

** Note: All of the above-mentioned certification forms are available from your administrative office.*

** With respect to any requested certification described above, if you fail to provide a complete and sufficient certification, despite the opportunity to cure any deficiencies, your leave may be denied.*

Definition of a Health Care Provider

Providers who may provide certification of a serious health condition include:

- ▶ doctors of medicine or osteopathy 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 under state law;
- ▶ physician assistants who are authorized to practice under state law;
- ▶ nurse practitioners, nurse-midwives and clinical social workers authorized to practice under state law and performing within the scope of their practice as defined under state law;

- ▶ Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, MA.; and
- ▶ a health care provider listed above who practices in a country other than the United States and who is authorized to practice under the laws of that country.

** Note: For purposes of Military Caregiver Leave, any of the following health care providers may complete the medical certification form (WH-385):*

- ▶ *United States Department of Defense;*
- ▶ *United States Department of Veterans Affairs;*
- ▶ *Department of Defense TRICARE network authorized private health care provider;*
- ▶ *Department of Defense non-network TRICARE authorized private health care provider.*

~Now, any health care provider listed herein may complete certification forms: WH-385 and WH-385-V. Note, however, that a second or third opinion may be required if the military caregiver leave certification form is completed by a health care provider who is not affiliated with the military.

FMLA Leave-Paid or Unpaid

You may use paid sick leave benefits (including sick leave bank credits), under the same circumstances as you ordinarily could use such benefits under the collective Agreements or the Rules of the Chief Judge, to remain on the payroll for all or part of an FMLA leave. You may choose to substitute accrued annual leave for *any of the situations covered by FMLA*, or you may opt to take FMLA leave without pay, even if you have accrued leave credits. You may also use accrued compensatory time to receive pay for time taken off for FMLA leave. *Note:* You may not opt to use leave credits to remain on the payroll during a period of FMLA leave due to a work-related illness or injury for which you are not entitled to a leave benefit under the collective Agreement or Rules of the Chief Judge.

Designation of FMLA Leave

Even if you have not expressly requested FMLA leave, the UCS must, as a requirement of federal law, designate any paid or unpaid leave that you take for FMLA-qualifying purposes, as FMLA leave. This designation must be based on information obtained from you. You will be provided with written notice of whether the leave will be designated as FMLA, if you will be required to provide additional certification information, and if you will be required to present fitness-for-duty certification prior to returning to work. If you will be required to provide fitness-for-duty certification, a list of the essential functions of your position will be provided with the designation notice.

Maintenance of Health Benefits/Job Restoration

The UCS will maintain your group insurance coverage while you are on unpaid FMLA leave on the same terms as if you continued on the payroll, provided that you had the coverage immediately prior to taking the leave. This obligation ceases: if and when you inform the UCS of your intent not to return to work at the end of the leave period; if you fail to return to work when your FMLA leave entitlement is exhausted; or if you fail to pay your normal share of the insurance premium. In some cases, the UCS may recover premiums it paid to maintain your health coverage if you do not return to work from FMLA leave.

If you are on unpaid FMLA leave and you fail to pay your health care premiums, your group health insurance may be cancelled, provided we notify you at least 15 days before the date that your coverage will lapse, or at our option, we may pay your share of the premiums during the FMLA leave and recover these payments from you upon your return to work.

Other benefits, such as accrual of leave credits, that would not normally continue during periods of unpaid leave do not continue during periods of unpaid FMLA leave.

Upon return from FMLA leave, you will be restored to your original job or to a job with equivalent pay, benefits and other terms and conditions of employment. Use of FMLA leave will not result in the loss of any employment benefit that you earned or were entitled to before using FMLA leave. FMLA leave will not extend your employment beyond the time it would otherwise terminate pursuant to law, rule or regulation.

FMLA Enforcement

An employer may not interfere with, restrain or deny the exercise of any right provided by the FMLA or discharge

or discriminate against any individual for opposing any practice made unlawful by the FMLA, or for involvement in any proceeding under or related to the FMLA. The FMLA does not affect any other federal or state law that prohibits discrimination, nor supersede any state or local law that provides greater family or medical leave protection. The FMLA does not affect the obligation of the UCS to provide greater leave rights under its collective bargaining Agreements or the Rules of the Chief Judge. The utilization of FMLA leave cannot be used as a negative factor in employment actions, such as hiring, promotions or disciplinary actions.

The FMLA is administered and enforced by the U.S. Department of Labor, Wage and Hour Division (“DOL”). An employee may file a complaint with the DOL or bring a civil action against the employer for FMLA violations.

If you have questions about the UCS’s administration of the FMLA, contact your administrative office. *If you believe that you were improperly denied FMLA leave or that an improper designation of FMLA has been made, contact your administrative office. If your concern is not resolved at that level, you may write to the Director of Human Resources, Division of Human Resources, 10th Floor, 25 Beaver Street, New York, NY 10004. The Director or designee will investigate your concern and respond to you in writing.*

Additional information may be obtained from the Department of Labor Office of the Wage and Hour Division, listed in telephone directories under U.S. Government, Department of Labor, Employment Standards Administration. Information may also be obtained from the DOL’s website: <http://www.wagehour.dol.gov> and toll-free information and help line: (866) 487-9243.

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