



**FAMILY AND MEDICAL LEAVE ACT- MILITARY FREQUENTLY ASKED QUESTIONS (FAQs)**

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| <b>DHR-Q #: To be assigned.</b>          | <b>Authority: Family and Medical Leave Act of 1993, as amended Feb. 25, 2015; M.R. 5.3, 5.7</b> |
| <b>Effective Date: November 20, 2019</b> | <b>Supersedes: State of Delaware FMLA (HRM/OMB website, revised Sept. 29, 2014)</b>             |

The content in these Frequently Asked Questions (FAQs) applies to State of Delaware (State) Executive Branch cabinet agency employees. Other employers of State personnel may choose to adopt the [Family and Medical Leave Act Policy and Procedures](#) as well as the provisions in this FAQs. Non-cabinet agency personnel should contact their supervisor to determine whether their employer has adopted these provisions. Employees should direct questions or concerns to their supervisor or Human Resources representative.

**ELIGIBILITY FOR FMLA LEAVE**

**1. What are the military family leave provisions of the Family and Medical Leave Act (FMLA)?**

The new FMLA regulations include two types of military family leave referred to as “qualifying exigency leave” and “military caregiver leave.”

**2. Are all State of Delaware (State) employees entitled to take military family leave?**

No. To be eligible to take FMLA leave for any qualifying reason, an employee must have worked for the State for an aggregate total of 12 months and have worked at least 1,250 hours over the previous 12 months. Employment with the State prior to breaks in service of seven years or greater does not count towards the 12-month aggregate.

**3. Must the employee be in a permanent position with the State to take military family leave?**

No. All State employees who meet the eligibility requirements of having worked for the State for an aggregate of 12 months and worked the prerequisite 1,250 hours over the previous 12 months are eligible to take FMLA leave for any qualifying reason regardless of employment status.

**4. Must the qualified member of the Armed Forces, National Guard or Reserves be an employee of the State for the employee to qualify to take military family leave?**

No. Both types of military family leave – “qualifying exigency leave” and “military caregiver leave” – “are for the family members of a qualified member of the Armed Forces, National Guard or Reserves and only the family member requesting the leave needs to be an employee of the State.

**5. Is military family leave paid?**

No. The FMLA only requires unpaid leave; however, the law permits the employer to require the employee to use accrued paid leave. The State requires employees to use sick and annual leave concurrent with FMLA leave except for one workweek of annual leave and one workweek of sick

leave, which they may elect to retain for use upon return to work. Usage of accrued sick leave shall only be in accordance with Merit Rule (M.R.) 5.3. An employee's ability to elect to use accrued paid leave during a period of FMLA leave is determined by the terms and conditions of the applicable paid leave policy. NOTE: "Qualifying Exigency Leave" is for non-medical activities and therefore does not qualify under M.R. 5.3 for the usage of sick leave.

## **QUALIFYING EXIGENCY LEAVE**

### **6. What is the definition of qualifying exigency leave?**

Qualifying exigency leave is one of the military family leave provisions. It may be taken for any qualifying exigency arising out of the fact that a covered military member is on active duty or on call to active duty status. The U.S. Department of Labor's (USDOL) regulations include a broad list of non-medical activities that are considered qualifying exigencies and will permit eligible employees who are family members of a covered military member to take FMLA leave to address the most common issues that arise when a covered military member is deployed, such as attending military sponsored functions, making appropriate financial and legal arrangements, and arranging alternative childcare. For a list of examples of a qualifying exigency, refer to question No. 12.

### **7. Who is a covered military member?**

A covered military member is the employee's spouse, son, daughter, parent or next of kin who is on active duty or on call to active duty status for the National Guard or Reserves and in some cases a retired member of the regular Armed Forces.

### **8. What is active duty or call to active duty status?**

Active duty or call to active duty status refers to a member of the National Guard or Reserves who is under federal call or order to active duty or has been notified of an impending call or order to active duty, in support of a contingency operation. It does not apply to call to active duty by the State Governor unless ordered by the President.

### **9. Are families of service members in the regular Armed Forces eligible for qualifying exigency leave?**

Yes. A covered employer must grant an eligible employee up to **12 workweeks** of unpaid, job-protected leave during any 12-month period for qualifying exigencies that arise when the employee's spouse, son, daughter, or parent is on covered active duty or has been notified of an impending call or order to covered active duty. Covered active duty means:

- for members of the **Regular** Armed Forces, duty during deployment of the member with the Armed Forces to a foreign country; or
- for members of the **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.

**10. Can I take qualifying exigency leave if I am the covered military member?**

No. As a member of the National Guard and Reserves, you enjoy employment and benefit protection under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and various State benefits and entitlements. For more information, please see [Frequently Asked Questions – Military Leave Policy](#).

**11. How will I know whether a covered military member has been called to or is on active duty in support of a contingency operation?**

A covered military member's active duty orders will generally specify whether s/he is serving in support of a contingency operation. You also may confirm whether the service member is serving in support of a contingency operation by contacting the appropriate military branch.

**12. What is considered a qualifying exigency?**

The USDOL has developed a list of qualifying exigencies that encompass a wide range of specific non-medical activities in the following broad categories.

Qualifying exigencies include:

- Issues arising from a covered military member's short notice deployment (i.e., deployment on seven or fewer days of notice for a period of seven days from the date of notification);
- Military events and related activities, such as official ceremonies, programs, or events sponsored by the military or family support or assistance programs, and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross;
- Certain childcare and related activities arising from the active duty or on call to active duty status of a covered military member, such as arranging for alternative childcare, providing childcare on a non-routine, urgent, immediate-need basis, enrolling in or transferring a child to a new school or day-care facility, and attending certain meetings at school or a day-care facility if they are necessary due to circumstances arising from the active duty or call to active duty status of the covered military member;
- Making or updating financial and legal arrangements to address a covered military member's absence;
- Attending counseling provided by someone other than a healthcare provider for oneself, the covered military member, or the child of the covered military member, the need for which arises from the active duty or call to active-duty status of the covered military member;
- Taking up to five days of leave to spend time with a covered military member who is on short-term temporary rest and recuperation leave during deployment;
- Attending to certain post-deployment activities, including attending arrival ceremonies, reintegration briefings and events, and other official ceremonies or programs sponsored by the military for a period of 90 days following the termination of the covered military member's active duty status, and addressing issues arising from the death of a covered military member; and
- Any other event that the employee and employer agree is a qualifying exigency.

**13. Can I take qualifying exigency leave to pick up a child from school or attend a school event?**

Yes, in certain limited circumstances. An eligible employee caring for a covered military member's child may use qualifying exigency leave to provide childcare on an urgent, immediate-need basis, but not on a routine, everyday basis, where the need to provide the care arises from the active duty or call to active duty status of the covered military member. Accordingly, an employee could use qualifying exigency leave to provide childcare in an emergency, such as a school closure due to inclement weather, if the employee's need to provide the care arises from the active duty status of a covered military member. Qualifying exigency leave could not be used, however, on a routine basis to provide daily childcare after school hours (although it could be used temporarily while arranging for such care). Qualifying exigency leave may also be used to attend certain meetings with school staff, if those meetings are necessary due to the active duty or call to active duty status of the covered military member. For example, qualifying exigency leave could be used to attend a meeting with a teacher to discuss behavioral problems related to the child's parent being deployed. Qualifying exigency leave may not be used, however, for attending routine school events, such as birthday parties or plays.

**14. For what additional events may employers and employees agree to use qualifying exigency leave?**

Employers and employees may agree to cover any additional events arising from the covered military member's active duty or call to active duty status as qualifying exigency leave. Such events may include leave to spend time with a covered military member either prior to or after deployment or to attend to household emergencies that would normally have been handled by the covered military member. Employers and employees must agree to both the timing and duration of any such qualifying exigency leave and the leave may be counted against the employee's 12-week FMLA leave entitlement.

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

An employee must provide notice of the need for qualifying exigency leave as soon as practicable. For example, if an employee receives notice of a family support program a week in advance of the event, it should be practicable for the employee to provide to his/her employer the need for qualifying exigency leave the same day or the next business day. When the need for leave is unforeseeable, an employee must comply with an employer's normal call-in procedures absent unusual circumstances. An employee does not need to specifically assert his/her rights under the FMLA or even mention the FMLA, when providing notice. The employee must provide "sufficient information" to make the employer aware of the need for FMLA leave and the anticipated timing and duration of the leave.

**16. What are the certification requirements for taking qualifying exigency leave?**

The first time that an employee requests qualifying exigency leave, an employer may require the employee to provide a copy of the covered military member's active duty orders or other documentation issued by the military that indicates that the covered military member is on active duty or on call to active duty status in support of a contingency operation, and the dates of the covered military member's active duty service. In addition, each time that an employee first

requests leave for one of the qualifying exigencies, an employer may require certification of the exigency necessitating leave. Certification supporting leave for a qualifying exigency includes: appropriate facts supporting the need for leave, including any available written documentation supporting the request; the date on which the qualifying exigency commenced or will commence and the end date; where leave will be needed on an intermittent basis, the frequency and duration of the qualifying exigency; and appropriate contact information if the exigency involves meeting with a third party. The State has a form for employees' use in obtaining certification that meets qualifying exigency leave requirements.

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

The same timing requirements for certification apply to all requests for FMLA leave, including those for military family leave. The employee must provide the requested certification to the employing State agency within 15 calendar days after the employer's request, unless it is not practicable under the circumstances to do so despite the employee's diligent, good-faith efforts.

If the qualifying exigency involves a meeting with a third party, employers may verify the schedule and purpose of the meeting with the third party. Additionally, an employer may contact the appropriate unit of the Department of Defense (DoD) to confirm that the covered military member is on active duty or on call to active duty status. Employers are not permitted to require second or third opinions on qualifying exigency certifications. Employers are also not permitted to require recertification for such leave.

**18. How much FMLA leave may I take for qualifying exigencies?**

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

**19. Are the 12 weeks of qualifying exigency leave a one-time entitlement?**

No. If a covered military member's active duty or call to active duty status spans more than one FMLA leave year, an eligible employee would be eligible to take qualifying exigency leave in each FMLA leave year. Moreover, an eligible employee could take qualifying exigency leave in a subsequent FMLA leave year for a different covered military member. Finally, if the same covered military member returns from deployment and is subsequently redeployed, the eligible employee would again be entitled to qualifying exigency leave.

**20. How much leave can I take if I need leave for both a serious health condition and a qualifying exigency?**

Qualifying exigency leave, like leave for a serious health condition, is an FMLA-qualifying reason for which an eligible employee may use his or her entitlement for up to 12 workweeks of FMLA leave each year. The 12 weeks of his/her FMLA leave entitlement would be a combined total of time used for a qualifying exigency and leave for a serious health condition.

**21. Can I take qualifying exigency leave when my covered military member returns from deployment?**

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

**MILITARY CAREGIVER LEAVE****22. What is military caregiver leave?**

Military caregiver leave is the second of two military family leave provisions. Such leave may be taken by an eligible employee to care for a covered service member with a serious injury or illness. This type of FMLA leave is based on a recommendation of the President's Commission on Care for America's Returning Wounded Warriors.

**23. Who is eligible to take military caregiver leave?**

An eligible employee who is the spouse, son, daughter, parent or next of kin of a covered service member with a serious injury or illness may take job-protected FMLA leave to provide care to the service member.

**24. Must the covered service member be an employee of the State?**

No, the service member does not need to be an employee of the State. Military caregiver leave is for the family member of a covered service member, so the family member requesting the military caregiver leave must be the eligible employee.

**25. Are families of service members in the regular Armed Forces eligible for military caregiver leave?**

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

**26. Who is a covered service member?**

A covered service member is 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 incurred in the line of duty on active duty.

**27. Can I take military caregiver leave if I am the stepson or stepdaughter of the covered service member or if I am the stepparent of a covered service member?**

Yes. Under the FMLA for military caregiver leave, a "son or daughter of a covered service member" means a covered service member's biological, adoptive or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, and who is of any age. Under the FMLA for military caregiver leave, a "parent of a covered service member" means a covered service member's

biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered service member. This term does not include parents “in-law.”

**28. Can I take military caregiver leave if I am the son-in-law or daughter-in-law of the covered service member or if I am the father-in-law or mother-in-law of a covered service member?**

Under the FMLA for military caregiver leave, in-laws do not meet the definition of a “son or daughter of a covered service member” or a “parent of a covered service member” nor do in-laws meet the definition of next of kin which specifies blood relations.

**29. What is a serious injury or illness?**

A serious injury or illness is an injury or illness incurred by a covered service member in the line of duty on active duty that may render the service member medically unfit to perform the duties of the member’s office, grade rank, or rating.

**30. How much leave may I take to care for a covered service member?**

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

**31. May I take FMLA leave to both care for a covered service member and for another FMLA qualifying reason during this “single 12-month period?”**

Yes. The regulations provide that an eligible employee is entitled to a combined total of 26 workweeks of military caregiver leave and leave for any other FMLA-qualifying reason in this “single 12-month period,” provided that the employee may not take more than 12 workweeks of leave for any other FMLA-qualifying reason during this period.

For example, in the single 12-month period an employee could take 12 weeks of FMLA leave to care for a newborn child and 14 weeks of military caregiver leave but could not take 16 weeks of leave to care for a newborn child and 10 weeks of military caregiver leave.

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

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

**33. Can I take military caregiver leave as the son or daughter of a covered service member if I am 18 years of age or older?**

Yes. The new FMLA regulations contain special definitions for son and daughter for both military leave provisions. For military caregiver leave, an eligible employee may take leave if s/he is the “son or daughter of a covered service member,” which is defined as the covered service member’s biological, adoptive or foster child, stepchild, legal ward, or a child for whom the covered service member stood in loco parentis, and who is of any age.

**34. Can I take military caregiver leave to care for a covered service member on an intermittent basis?**

In order to qualify for intermittent leave to care for a family member or covered service member, the intermittent leave must be medically necessary.

**35. Who is a service member’s “next of kin” for purposes of military caregiver leave?**

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

**36. Can I take military caregiver leave to care for a service member who is no longer serving in the military?**

No. Former members, including retired members, of the regular Armed Forces, the National Guard or the Reserves are not considered “covered service members” under the military caregiver leave provision. Military caregiver leave does cover seriously ill or injured service members on the temporary disability retired list; service members on the permanent disability retired list, however, are not covered.

**37. Can I take military caregiver leave for more than one seriously injured or ill service member, or more than once for the same service member if s/he has a subsequent serious illness or injury?**

Yes. By regulation, military caregiver leave is a “per-service member, per-injury” entitlement. Accordingly, an eligible employee may take 26 workweeks of leave to care for one covered service member in a “single 12-month period,” and then take another 26 workweeks of leave in a different “single 12-month period” to care for another covered service member. An eligible employee may also take 26 workweeks of leave to care for a covered service member in a “single 12-month period,” and then take another 26 workweeks of leave in a different “single 12-month period” to care for the same



service member with a subsequent serious injury or illness (e.g., if the service member is returned to active duty and suffers another injury).

**38. Can I take additional military caregiver leave if a covered service member receives a serious injury or illness and later manifests a second serious injury or illness?**

Yes. If a covered service member incurs a serious injury or illness and manifests a second serious injury or illness later, an eligible employee would be entitled to an additional 26-workweek entitlement to care for the covered service member in a separate "single 12-month period;" however, the covered service member must still be a member of the Armed Forces, or the National Guard or Reserves, including those on the temporary disability retired list, and the second serious injury or illness must have been incurred in the line of duty on active duty. For example, an eligible employee may take military caregiver leave to care for a covered service member who has suffered a limb amputation in the line of duty on active duty; and if that same service member manifests a brain injury a year later arising from the same incident, the employee would be eligible to take another 26 workweeks of military caregiver leave at that time.

**39. Can I care for two seriously injured or ill service members at the same time?**

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

**40. What type of notice must I provide to my employer when taking military caregiver FMLA leave because of a qualifying exigency?**

An employee must provide 30 days' advance notice of the need to take FMLA leave for planned medical treatment for a serious injury or illness of a covered service member. When 30 days' advance notice is not possible, the employee must provide notice as soon as practicable considering all the facts and circumstances. When the need for leave is unforeseeable, an employee must comply with an employer's normal notice or call-in procedures, absent unusual circumstances. An employee does not need to specifically assert his/her rights under the FMLA, or even mention the FMLA, when providing notice. The employee must provide "sufficient information" to make the employer aware of the need for FMLA leave and the anticipated timing and duration of the leave.

**41. Are there certification requirements for taking military caregiver leave?**

Yes. When leave is taken to care for a covered service member with a serious injury or illness, the State, as your employer, has a right and does require an employee to obtain a certification completed by an authorized healthcare provider of the covered service member. (See "[Certification of Serious Injury or Illness of Current Servicemember for Military Family Leave \(FMLA\)](#)".)

**42. Are the certification procedures (timing, authentication, clarification, second and third opinions, recertification) the same for military caregiver leave and leave due to a serious health condition?**

The same timing requirements for certification apply to all requests for FMLA leave, including those for military family leave. The employee must provide any requested certification to the employing State agency within 15 calendar days after the employer's request, unless it is not practicable under

the circumstances to do so, despite the employee's diligent, good-faith efforts. The regulations also permit employers to authenticate and clarify medical certifications submitted to support a request for military caregiver leave using the procedures applicable to FMLA leave taken to care for a family member with a serious health condition. Employers are not permitted to require second or third opinions on military caregiver leave. Employers are also not permitted to require recertification for such leave.

**43. Are private healthcare providers, as well as military healthcare providers, permitted to complete a certification for military caregiver leave?**

Yes. A private healthcare provider can complete certifications for military caregiver leave if the healthcare provider is either a DoD TRICARE network authorized private healthcare provider, or a DoD non-network TRICARE authorized private healthcare provider. DoD healthcare providers and Veterans Affairs healthcare providers can also complete a certification for military caregiver leave. See 29 C.F.R. § 825.310(a).

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

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

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

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

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

For military caregiver leave that also qualifies as leave taken to care for a family member with a serious health condition, the regulations provide that an employer must designate the leave as military caregiver leave first. The USDOL believes that applying military caregiver leave first will help to alleviate some of the administrative issues caused by the running of the separate "single 12-month period" for military caregiver leave. The regulations also prohibit an employer from counting leave that qualifies as both military caregiver leave and leave to care for a family member with a serious health condition against both an employee's entitlement to 26 workweeks of military caregiver leave and 12 workweeks of leave for other FMLA-qualifying reasons.

**ADDITIONAL RESOURCES:**

- ["Certification for Serious Illness/Injury of a Current Servicemember for Military Caregiver Leave under the FMLA" \(delaware.gov\)](#)
- ["Frequently Asked Questions - Military Leave Policy" \(delaware.gov\)](#)
- [Fact Sheet #28M: The Military Family Leave Provisions under the Family and Medical Leave Act | U.S. Department of Labor \(dol.gov\)](#)