

# Should I Stay or Should I Go? FMLA and other Leave and Obligations

*Kristin Nealey Meier*



Ryan, Swanson & Cleveland, PLLC

---

# Topics of Discussion

---

## FMLA

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

# Topics of Discussion

---

## Other Leave

- Washington Family Leave Act (WFLA)
- Washington Family Care Act
- Washington Law Against Discrimination (WLAD)
- Leave for Victims of Domestic Violence/Sexual Assault
- Leave for Spouses of Military Personnel
- Leave for Emergency Services Personnel
- Jury and Witness Duty Leave

---

# Employer Coverage

---

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

# Employee Eligibility

- 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

# Qualifying Leave Reasons

- 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
  - 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

- **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 under state law for purposes of marriage in the state where the employee resides, including common law marriage and same-sex 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

- 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

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

- Inpatient Care (an overnight stay in a hospital, hospice, or residential medical facility, plus any related incapacity or subsequent treatment), or
- Continuing Treatment by a Health Care Provider
  - 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)

*(continued)*

# Qualifying Leave Reasons – Serious Health Condition

- Continuing Treatment by a Health Care Provider
  - Incapacity of more than three consecutive, full calendar days that involves either:
    - Pregnancy (Incapacity due to pregnancy or prenatal care)
    - Chronic Conditions
    - Permanent/Long-term Conditions
    - 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

- 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.

# Intermittent Leave

- 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

*(continued)*

# Intermittent Leave

- 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

---

- 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

- 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

- “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
  - Examples: vacation; PTO; sick leave; workers’ compensation leave; disability leave



# 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

- 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
- \$110 penalty for willful posting violation

# Employer Responsibilities – Provide Notice of Eligibility

- 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 Designation

- 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 *(continued)*

# Employer Responsibilities – Maintain Group Health Plan Benefits

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

- 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 (“substantial and grievous” harm)

# Employer Responsibilities – Prohibited Employment Actions

- 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

- 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

- 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

*(continued)*

# Employee Responsibilities – Notice Requirements

- Comply with employer's usual and customary procedural requirements for requesting leave absent unusual circumstances
- Foreseeable Leave - 30 days notice, or as soon as practicable
- Unforeseeable Leave - as soon as practicable

# Employee Responsibilities – Provide Certification

- 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

*(continued)*

# Employee Responsibilities – Provide Certification

- 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

*(continued)*

# Employee Responsibilities – Provide Certification

- 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

*(continued)*

# Employee Responsibilities – Provide Certification

- **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

---

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



# Employee Responsibilities – Fitness-for-Duty Certification

- 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

# 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

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

# Qualifying Exigency Leave – Covered Active Duty

- 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

- 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

- 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

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 (designated or closest blood relative)

- 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

---

# Covered Servicemember

---

A **covered servicemember** may be:

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



# Covered Servicemember – Veteran

---

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

# Covered Servicemember – Serious Injury or Illness

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

- 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

---

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

# Veteran Serious Injury or Illness

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*
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

- 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
- 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

- “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

- 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



# State of Washington Requirements

- Employers of 8 or more employees must provide a woman with leave for the time she is sick or temporarily disabled because of pregnancy or child birth.
- Must treat pregnancy related leave the same as other temporary disabilities, including benefits.
- Washington Family Leave Act provides for up to 12 weeks of unpaid leave for the birth or placement of a child **in addition to the woman's pregnancy disability leave**. The Act adopts the same qualification standards as the FMLA.

*(continued)*

# State of Washington Requirements

- An employee who uses all or part of FMLA leave for an exigent reason related to military deployment or for military caregiver leave may still have access to all 12 weeks of FLA leave (including for their own serious health condition, care of an ill family member, or care of a new child).

---

# Reasonable Accommodation for Disabilities (ADA, WLAD)

---

An employer's duty to reasonably accommodate an employee's disability may require it to grant additional leave beyond that required by the FMLA or state leave laws.

# Other Leave Laws

---

## Washington Family Care Act

RCW 49.12.265 and WAC 296-130

- Employers with 1 or more employees
- Employees eligible immediately upon employment who have a paid leave benefit
- If offer leave, must allow paid sick leave for family care

# Other Leave Laws

---

## Leave for Victims of Domestic Violence, Sexual Assault or Stalking

RCW 49.77

- Employers with 1 or more employees
- All employees are eligible immediately
- Reasonable leave to obtain legal and social help
- Family members covered
  - Child, Spouse, Parent, Parent-in-Law, Grandparent, person dating

# Other Leave Laws

---

## Leave for Spouses of Military

RCW 49.77

- Employers with 1 or more employees
- All employees who work 20 or more hours/week
- 15 days per deployment
- To be taken prior to or while spouse is on leave from deployment

# Other Leave Laws

---

## Leave for Emergency Services Workers

RCW 49.12.460

- Employers with 20 or more FTEs in prior year
- Employees who are volunteer firefighters, a reserve peace officer or Civil Air Patrol
- Allows for late arrival or missed work to perform emergency services

# Other Leave Laws

## Jury and Witness Duty Leave

RCW 2.36.165

- Employers with 1 or more employees
- All employees, immediately upon employment
- Employer must provide sufficient leave to serve
- If employee receives a summons, employer may not:
  - Deprive an employee of employment;
  - Threaten, coerce or harass an employee; or
  - Deny an employee promotional opportunities.



***Thank you!***



**Kristin N. Meier**  
**Ryan, Swanson & Cleveland**

**kmeier@ryanlaw.com**  
**(206) 654-2293**



Ryan, Swanson & Cleveland, PLLC