LABOR RELATIONS

UNITED STATES
POSTAL SERVICE

November 24, 2015

Leave under the Family and Medical Leave Act of 1993

The attached jointly-developed document provides the mutual understanding of the national parties on issues related to leave covered by the Family and Medical Leave Act (FMLA). This document is a summary overview of the FMLA. The guidance provided is not intended to, nor does it, increase or decrease the rights, responsibilities, or benefits of the employee or employer under the FMLA or Postal Service regulations. It neither adds to, nor modifies in any respect, the current FMLA or the collective bargaining agreement.

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Leave Under the Family and Medical Leave Act

This document is a summary overview of the Family and Medical Leave Act of 1993 (FMLA). Nothing in this summary is intended to conflict with or modify the FMLA, or Postal Service regulations. In the event of a conflict, the Act and/or Postal Service regulations will govern.

The FMLA applies to Postal Service employees. Postal Service regulations implementing the Act are found in Employee and Labor Relations Manual (ELM) Section 515. The law entitles eligible employees to take up to 12 workweeks of job-protected absences during a 12-month period as defined by the employer (the Postal Service has selected the postal leave year which begins with the first full pay period that begins in a calendar year and ends with the start of the next year) for one or more of the following reasons:

- The birth of an employee's child and the care of that child during the first year after birth. Circumstances may require that leave covered by FMLA (herein referred to as "FMLA leave")begins before the actual date of birth of a child, i.e. for prenatal care or if the mother's condition prevents her from performing the functions of her position.

- The placement of a child with the employee for adoption or foster care. The employee may be entitled to FMLA leave before the actual placement or adoption of a child when, for example, the employee is required to attend counseling sessions, appear in court, or consult with attorneys or doctors representing the birth parent prior to placement. FMLA coverage expires one year after the date of the placement.

- A serious health condition that makes the employee unable to perform the functions of the employee's job. An employee is "unable to perform the functions of the position" when his/her health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA).

- To care for the employee's spouse, son, daughter, or parent who has a serious health condition. This requires medical certification that an employee is needed to care for a family member and encompasses physical care and psychological comfort and reassurance when the family member is receiving inpatient or home care.

For the purpose of the FMLA the following definitions apply:

A parent is defined as a biological, adoptive, step or foster parent or an *in loco parentis.* An *in loco parentis* is a person who acts as a parent toward a son or daughter, or a person who had such responsibility for the employee when the employee was a child. FMLA regulations do not require an employee who intends to assume the responsibilities of a

parent to establish that he or she provides both day-to-day care and financial support in order to be found to stand *in loco parentis* to a child. For example, where an employee provides day-to-day care for his or her unmarried partner's child (with whom there is no legal or biological relationship) but does not financially support the child, the employee could be considered to stand *in loco parentis* to the child and therefore be entitled to FMLA leave to care for the child if the child had a serious health condition. Similarly, an employee who will share equally in the raising of an adopted child with a same sex partner, but who does not have a legal relationship with the child, would be entitled to leave to bond with the child following placement, or to care for the child if the child had a serious health condition, because the employee stands *in loco parentis* to the child.

A Spouse, as defined in the statute, means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either:

(1) Was entered into in a State that recognizes such marriages; or

(2) If entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

A son or daughter is defined as biological, adopted, foster, *in loco parentis* (defined above under definition of parent), legal ward or step child under the age of 18; or a child 18 or over who has a disability as defined under the ADA or Rehabilitation Act and the disability makes the person incapable of self-care.

Disability under the ADA or the Rehabilitation Act, as amended, is defined as an impairment which substantially limits a major life activity. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. "Major life activity" also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. "Substantially limits" means a restriction as compared to most people in the general population. An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

"Incapable of self-care" is the need for assistance or supervision to provide daily care in three or more "activities of daily living": grooming, bathing, eating, hygiene, cooking, cleaning, paying bills, using a phone or the post office, shopping.

There is no "laundry list" of serious health conditions. Other than incapacity due to pregnancy or for prenatal care, the circumstances, not the diagnosis, determine whether a condition is serious. Therefore, every request for FMLA leave must be considered on a case-by-case basis. The definitions of a "serious health condition," as defined by the statute and regulations, must be considered alongside the information provided by the employee and the employee's healthcare provider.

Management is within its rights to ask employees about the circumstances of their condition in order to determine whether absences may be protected under the FMLA and/or to assess whether the absences may require return-to-work clearance per ELM 865.

Military family leave. The National Defense Authorization Acts (NDAA) of 2008 created two new categories of military family leave covered under the FMLA: qualifying exigency leave and military caregiver leave. The NDAA of 2010 expanded both categories of military family leave.

Qualifying exigency leave. The Postal Service must grant an eligible employee up to 12 workweeks of FMLA leave during the 12-month FMLA leave period for qualifying exigencies that arise out of the fact that the employee's spouse, son, daughter or parent, who is a member of the Regular Armed Forces, National Guard, Reserves, or a retired member of the Regular Armed Forces or Reserves, is under a call or order to covered active duty (or notification of an impending call or order to covered active duty) during the deployment of the member with the Armed Forces to a foreign country. For those military members in the National Guard or Reserves, the call to active duty must also be in support of a contingency operation.

For purposes of qualifying exigency leave, the 12-month period is the postal leave year that the Postal Service has established for the other categories of FMLA leave. Qualifying exigencies that may arise out of the covered military member's covered active duty or call to covered active duty include:

- Short Notice Deployment
- Post-deployment activities
- Military event or related activity
- Counseling
- Childcare and school activity
- Rest and recuperation
- Financial or legal arrangements
- Parental care
- Additional activities arising from the call to duty (Provided the employer and employee agree that the leave qualifies as an exigency and agree on the timing and duration of the leave.)

Military caregiver leave. The Postal Service must grant an eligible employee who is a spouse, son, daughter, parent, or next of kin of a covered service member or covered

veteran with a serious injury or illness up to a total of 26 workweeks of leave during a single 12-month period to care for the covered service member or covered veteran. While the 12-month period for every other category of FMLA leave coincides with the postal leave year, the 12-month period for military caregiver leave begins on the date that the eligible employee first takes military caregiver leave.

A "covered service member" is a current member of the Armed Forces, including a member of the National Guard or Reserves, who is receiving medical treatment, recuperation, or therapy, or is in outpatient status, or is on the temporary disability retired list for a serious injury or illness. A "serious injury or illness" is one incurred by a service member in the line of duty while on active duty that may cause the service member to be medically unfit to perform the duties of his or her office, grade, rank, or rating. A serious injury or illness also includes injuries or illnesses that existed before the service member's active duty that were aggravated by service in the line of duty on active duty.

A "covered veteran" is a veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness and:

- served in the Armed Forces (including a member of the National Guard or Reserves);
- was discharged or released under conditions other than dishonorable;
- was discharged within the five-year period before the eligible employee first takes FMLA military caregiver leave to care for him or her.

For covered veterans, a "serious injury or illness" is an injury or illness that was incurred by the covered veteran in the line of duty on active duty in the Armed Forces or one that existed before the veteran's active duty and was aggravated by service in the line of duty on active duty, and that is:

1. a continuation of a serious injury or illness that was incurred or aggravated when the 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; *or*
2. a physical or mental condition for which the veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and the rating is based at least in part on the condition for which caregiver leave is needed; *or*
3. a physical or mental condition that substantially impairs the veteran's ability to work due to the condition, 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.

Any *one* of these definitions meets the FMLA's definition of a serious injury or illness for a covered veteran regardless of whether the injury or illness manifested before or after the individual became a veteran.

The FMLA has created several separate definitions of family members for both categories of military family leave.

Son or daughter, for the purposes of qualifying exigency leave, means the employee's biological, adopted, foster child, stepchild, legal ward, or a child for whom the employee stood *in loco parentis*, who is on covered active duty or call to covered active duty status, and who is of any age.

Son or daughter of a covered service member, for purposes of military caregiver leave, is the service member's biological, adopted or foster child, stepchild, legal ward, or a child for whom the service member stood *in loco parentis*, and who is of any age.

Parent of a covered service member, for purposes of military caregiver is a covered service member's biological, adoptive, step or foster parent, or any other individual who stood *in loco parentis* to the covered service member.

Next of kin of a covered service member, for purposes of military caregiver leave is the nearest blood relative, other than the covered service member's spouse, parent, son, or daughter, in the following order of priority: Blood relatives who have been granted legal custody of the covered 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.

Eligibility Requirements: Any career or non-career employees who meet the eligibility requirements may take FMLA leave if they meet the eligibility requirements at the time the leave starts; that is, they have been employed by the Postal Service for at least 12 months (this time does not have to be consecutive, but generally must have been worked within the past seven years) and they have completed at least 1250 workhours during the 12-month period immediately preceding the date the leave starts. The 1250 workhours includes overtime, but excludes any paid or unpaid absence, except for absences due to military service. Leave Without Pay (LWOP), including union LWOP, does not count toward the 1250 workhour eligibility requirement.

Military Service: The Postal Service will credit any period of military service as follows:

- Each month served performing military service counts as a month actively employed by the employer for the purpose of determining the 12 months of employment requirement.

- The hours that would have been worked for the employer, based on the employee's work schedule prior to the military service, are added to any hours actually worked during the previous 12-month period to determine if the employee meets the 1250 workhour requirement. The hours the employee would have worked will be calculated in the same manner as back pay calculations, found in Section 436 of the ELM.

Calculating the 1250 Per Condition, Per Leave Year. The 1250 workhour eligibility test is applied only once, at the beginning of a series of intermittent absences, if all absences are for the same FMLA-qualifying reason during the same 12-month leave year. The employee remains eligible throughout that leave year even if subsequent absences bring the employee below the 1250 workhour requirement.

If an employee has a different FMLA-qualifying reason for leave during the leave year, the employee must meet the 1250 workhour eligibility test at the commencement of the leave for the second qualifying reason. If the employee does so, he/she is eligible for FMLA protection of absences for both qualifying reasons for the remainder of the leave year, or until the 12-week entitlement has been exhausted (or 26-week entitlement in the case of military caregiver leave).

However, if the employee is unable to meet the 1250 workhour requirement for the second qualifying reason in the leave year, the employee is NOT entitled to FMLA protection for the second qualifying reason, but remains entitled to FMLA protection for the first qualifying reason for the remainder of the leave year or until the 12-week entitlement has been exhausted (or 26-week entitlement in the case of military caregiver leave). Therefore, it is possible for this employee to be eligible for FMLA protection for one qualifying reason, but not for the second and different reason.

The 1250 workhour eligibility requirement must be recalculated at the commencement of each subsequent and separate condition for which the employee needs leave in order to determine eligibility for each condition in each leave year.

The 1250 workhour eligibility requirement is recalculated upon the first absence in the new leave year related to the FMLA certified condition. Where the employee's need for leave due to the employee's own serious health condition, or the serious health condition of the employee's covered family member, lasts beyond a single leave year, the employer may require the employee to provide a new medical certification in each subsequent leave year.

"When an employee is awarded back pay, the hours an employee would have worked, if not for the action which resulted in the back pay period, are counted as work hours for the 1250 work hour eligibility requirement under the Family Medical Leave Act (FMLA). If an employee substitutes annual or sick leave for any part of the back pay period that they were not ready, willing and able to perform their postal job, the leave is not counted as work hours for the 1250 work hour eligibility requirement under the FMLA. If a remedy modifies an action, resulting in a period of suspension or leave without pay, that time is

not counted as work hours for the 1250 hours eligibility requirement under the FMLA." (Step 4, B94N-4B-C 98056900, April 3, 2001, M-01436).

Employee Rights: For postal employees, with the exception of military caregiver leave, the leave year begins with the first full pay period that begins in a calendar year and ends with the start of the next year. Up to 12 workweeks of annual leave, sick leave, continuation of pay, LWOP, or a combination of these, depending on the situation, may be used for FMLA-covered conditions. LWOP must be approved for a covered absence when requested by an eligible employee. The leave may be taken in a single block of time, in separate blocks, or intermittently depending on the condition and the medical necessity for the leave. The FMLA requires employees to make a reasonable effort to schedule intermittent or reduced leave for treatment in a way that will not unduly disrupt workplace operations. Employees are ordinarily expected to consult with their employers prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employer and the employee.

In the case of military caregiver leave, the single 12-month period runs independently of the 12-month leave year that the Postal Service has established for all other types of FMLA leave. It begins on the first day the employee takes leave to care for a covered service member and ends 12 months later. The rules allow an eligible employee to take a combined total of 26 workweeks of military caregiver leave and leave for any other FMLA-qualifying reason during the single 12-month period as long as the employee does not take more than 12 workweeks of leave for the other FMLA-qualifying reasons during this period.

The right to take leave under FMLA applies equally to male and female employees. For example, a father, as well as a mother, may take FMLA for the placement for adoption or foster care, or to care for a child during the 12 months following the date of birth or placement.

On return from an FMLA-covered absence, an employee is entitled to return to the same position the employee held when the leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.

Employer Responsibilities: The employer is prohibited from interfering with, restraining, or denying the exercise of any rights provided by FMLA. Nor can the employer retaliate against an employee for exercising or attempting to exercise FMLA rights. Employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions. Likewise, FMLA-covered absences may not be used towards any disciplinary actions. Employees cannot waive, nor may employers induce, employees to waive their prospective rights under FMLA.

Employers must post and keep posted a notice containing the information in Wage and Hour Division Publication 1420, *Employee Rights and Responsibilities Under the Family and Medical Leave Act*. The employer, within five business days of learning of the

employee's need for leave, must notify the employee of the employee's eligibility for FMLA leave and of the employee's rights and responsibilities under the FMLA. The notice of rights and responsibilities must include, among other things, any requirements for the employee to furnish certification of a serious health condition, serious injury or illness sustained in the line of duty, or qualifying exigency arising out of active duty or call to active duty, and the consequences of failing to provide certification. The Postal Service uses Department of Labor (DOL) Form WH-381, *Notice of Eligibility and Rights & Responsibilities (FMLA)*, to meet its requirement to notify the employee of his or her eligibility, rights, and responsibilities.

Once the employer has sufficient information to determine whether an employee's leave is being taken for an FMLA-qualifying reason, the employer must notify the employee in writing within five business days that the leave will be designated as FMLA leave and the amount and type of leave that will be charged (annual, sick, LWOP). The Postal Service uses DOL Form WH-382, *Designation Notice (FMLA)*, to meet its requirement to notify the employee of his or her FMLA designation.

Under FMLA, the employee may request substitution of paid leave for the 12 workweeks (12 times the employee's normal scheduled hours per week) of unpaid absence per year in accordance with normal leave policies and bargaining unit agreements. However, under Postal Service policy an employee may use LWOP for an FMLA-covered absence.

Employee Responsibilities. The following are the employee's responsibilities when a request for FMLA leave is submitted:

- When the need for leave is foreseeable (e.g., pregnancy) notify management of the need for leave and provide appropriate supporting documentation (i.e., PS Form 3971, *Request for or Notification of Absence*) at least 30 days before the absence is to begin. If 30 days' notice is not practicable, notice must be given as soon as practicable, i.e., the same day the employee learns of the need for leave or the next business day.

- When the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. Employees should notify management as soon as practicable, i.e., the same day, at least, before the start of one's tour. Leave requests should be submitted via PS Form 3971, *Request for or Notification of Absence*.

- Provide certification requested by the employer for FMLA-covered absences within 15 calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts), and correct insufficient certification within seven days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts). The certification may be in any format, including the National Association of Letter Carriers (NALC) FMLA forms, as long as it provides the information required for

certification by the implementing regulations of the FMLA.

- For medical emergencies, the employee or his spokesperson may give oral notice of the need for leave, or notice may be given by phone, telegraph, fax, or other means.

In answer to whether management can require "supporting documentation" for an absence of three days or less in order for an employee's absence to be protected under the FMLA, the parties agreed that:

> [t]he Postal Service may require an employee's leave to be supported by an FMLA medical certification, unless waived by management, in order for the absence to be protected. When an employee uses leave due to a condition already supported by an FMLA certification, the employee is not required to provide another certification in order for the absence to be FMLA protected.
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> We further agree that the documentation requirements for leave for an absence of three days or less are found in Section 513.361 of the Employee and Labor Relations Manual which states in pertinent part that:
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> > *For periods of absence of 3 days or less, supervisors may accept the employee's statement explaining the absence. Medical documentation or other acceptable evidence of incapacity for work or need to care for a family member is required only when the employee is on restricted sick leave (see 513.39) or when the supervisor deems documentation desirable for the protection of the interests of the Postal Service.* (Pre-arbitration Settlement, Q98N-4Q-C 01090839, December 9, 2002, M-01474).

This settlement is intended to distinguish the documentation requirements for approved leave and the certification requirements for leave to be protected under the FMLA. However, in order for the leave to receive FMLA protection, management may require certification of a serious health condition from a health care provider as defined in the FMLA.

This settlement does not prejudice management's right to request "recertification" of a serious health condition. However, requests for recertification must be done on a case-by-case basis and in accordance with FMLA. FMLA does not permit the employer to require recertification for qualifying exigency leave or military caregiver leave.

FMLA Second and Third Opinion Process: The Postal Service may require a second medical opinion by a healthcare provider who is designated and paid for by the Postal Service. The healthcare provider designated may not be employed by the Postal Service on a regular basis.

If the original and second opinions differ, the Postal Service may require a third opinion. While a third-opinion healthcare provider is jointly designated or approved by

management and the employee, the Postal Service pays for the third opinion. The third medical opinion is final (ELM 515.54 and National Arbitrator Das Q00C-4Q-C03126482, January 28, 2005, C-25724). The FMLA does not permit second or third opinions for military caregiver leave.