

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
ATTENDANCE AND LEAVE MANUAL
POLICY BULLETIN 2015-01

Appendix I

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TO: Manual Recipients
FROM: Scott DeFruscio, Director Staffing Services Division
SUBJECT: FMLA Notification Regarding Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave (Family and Medical Leave Act)

The information contained in this document summarizes our current understanding of the revisions to the FMLA and should be read in conjunction with Policy Bulletins 2009-01 and 2010-01, and may be updated once new regulations or information becomes available.

The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking military caregiver leave under the FMLA due to a serious injury or illness of a covered veteran to submit a certification providing sufficient facts to support the request for leave.

For purposes of FMLA military caregiver leave, a serious injury or illness means an injury or illness incurred by the servicemember in the line of duty while on active duty in the Armed Forces (or that existed before the beginning of the servicemember's active duty and was aggravated by service in the line of duty while on active duty in the Armed Forces) and manifested itself before or after the servicemember became a veteran, and is:

- (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 servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or
- (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 such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or
- (iii) a physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or
- (iv) an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans' Affairs Program of Comprehensive Assistance for Family Caregivers.

The U.S. DOL has created a new form to reflect the amended changes. As a matter of State policy, agencies are required to use such form and must be aware of the amendments to the FMLA as they review documentation.

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REVISED MILITARY FAMILY LEAVE ENTITLEMENTS

**Military Caregiver Leave Due to
Injury or Illness of a Covered Veteran**

▪ ***Documentation Provisions***

The U.S. DOL has developed form WH-385-V, Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave, to assist the employer in obtaining documentation for military caregiver leave under the FMLA due to a serious injury or illness of a covered veteran.

Any one of the following health care providers may complete this certification:

- A United States Department of Defense (DOD) health care provider
- A United States Department of Veterans Affairs (VA) health care provider
- A DOD TRICARE network authorized private health care provider
- A DOD non-network TRICARE authorized private health care provider, or
- A health care provider as defined in Title 29 CFR 825.125.

A complete and sufficient certification to support a request for FMLA military caregiver leave due to a covered veteran's serious injury or illness includes written documentation confirming that the veteran's injury or illness was incurred in the line of duty while on active duty or existed before the beginning of the veteran's active duty and was aggravated by service in the line of duty while on active duty, and that the veteran is undergoing treatment, recuperation, or therapy for such injury or illness by a health care provider listed above.

Satisfactory medical documentation also includes "invitational travel orders" (ITOs) or "invitational travel authorizations" (ITAs) issued to any family member to join an injured or ill veteran at his or her bedside.

The regulations prohibit recertification during the time period specified in the documentation, and prohibit second or third medical opinions in connection with leave requested for this purpose unless the certification is provided by a non-military affiliated health care provider.

Other Provisions

Other provisions from the discussion of Military Caregiver Leave in Policy Bulletin 2009-01 (Eligible Employee, Amount of Leave to be Granted, Notice, and Use of Leave Credits) remain unchanged and are repeated below for reference.

Eligible Employee

An employee who meets the normal service requirements to be eligible for FMLA leave and is the spouse, parent, son, daughter, or next of kin of a covered veteran is eligible for leave for this purpose. The regulations define next of kin of a covered veteran as the nearest blood relative other than the covered veteran's spouse, parent, son, or daughter in the following priority: blood relatives who have been granted legal custody, brothers

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and sisters, grandparents, aunts and uncles, and first cousins, unless the veteran has specifically designated in writing another blood relative for purposes of military caregiver leave under the FMLA.

A husband and wife employed by the same employer are limited to a combined 26 week military caregiver leave in a single 12-month period per veteran per injury.

Covered Veteran

A covered veteran means a veteran who is undergoing medical treatment, recuperation or therapy for a serious injury or illness if he or she:

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

For any veteran who was discharged prior to March 8, 2013, the period of time between October 28, 2009 and March 8, 2013 will not count as part of the five-year period. For example, if your family member became a veteran on October 28, 2009 then you may begin to use your military caregiver leave entitlement at any time up until March 8, 2018. As long as your military caregiver leave begins within five years of the veteran's discharge, the 12-month period may extend beyond the five-year period.

Amount of Leave to be Granted

Eligible employees are entitled to up to 26 weeks of leave in a single 12-month period per covered veteran per injury. Additional periods of up to 26 weeks of leave may be taken in subsequent 12-month periods to care for a different veteran or to care for the same veteran who has a subsequent serious illness or injury.

To determine the single 12-month period, the regulations require that the 12-month period must be measured forward from the date an employee's first military caregiver leave to care for the covered veteran begins.

During the designated 12-month period, employees are limited to a combined total of 26 weeks of FMLA leave for any qualifying reason. Employees continue to be limited to 12 weeks of FMLA leave per calendar year for reasons other than to care for a covered veteran.

Leave that qualifies as both military caregiver leave and leave to care for a family member with a serious health condition should be designated as military caregiver leave in the first instance.

Leave is available in a continuous block of time or on an intermittent or reduced schedule basis as required.

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Notice

Where leave is foreseeable based on planned medical treatment for a serious injury or illness of a veteran, the normal FMLA notice requirement of 30 days or as soon as possible applies. Where leave is unforeseen, the normal FMLA notice requirement of as soon as practicable under the facts and circumstances of the specific case applies.

Use of Leave Credits

FMLA leave is unpaid. However, employees may also elect to charge appropriate leave credits during a period of FMLA leave. For example, a State employee taking military caregiver leave to provide care for her wounded son who is a covered veteran is eligible to charge up to 15 days of absence in a calendar year to family sick leave and may also elect to charge other categories of leave credits.

As a reminder, the FMLA does not require an employer to authorize the use of paid sick leave in any circumstance where it would not otherwise be authorized. As a matter of State policy, when use of leave credits would be allowed under the Attendance Rules, employees may elect to use appropriate leave credits during a period of FMLA leave or may choose not to use credits at their option. The term “appropriate leave credits” means credits that are available for absences for that specific reason. For example, no more than 15 days of accrued sick leave may be used in any calendar year for illness in the family.

The FMLA permits employees to use accrued vacation and personal leave credits and to go on leave without pay during FMLA absences even when accrued sick leave credits are available. Agencies cannot require that employees first exhaust sick leave credits before using other credits as sick leave or that all credits be exhausted before going on leave without pay. (This supersedes the normal State policy that sick leave credits must be used first.)

Questions concerning this benefit should be directed to the Attendance and Leave Unit of this Department at (518) 457-2295.

Attachment

Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave
(Form WH-385-V)

Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave (Family and Medical Leave Act)

U.S. Department of Labor Wage and Hour Division



OMB Control Number: 1235-0003 Expires: 5/31/2018

Notice to the EMPLOYER

The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking military caregiver leave under the FMLA leave due to a serious injury or illness of a covered veteran to submit a certification providing sufficient facts to support the request for leave. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 CFR 825.310. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 CFR 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 CFR 1635.9, if the Genetic Information Nondiscrimination Act applies.

SECTION I: For completion by the EMPLOYEE and/or the VETERAN for whom the employee is requesting leave

INSTRUCTIONS to the EMPLOYEE and/or VETERAN: Please complete Section I before having Section II completed. The FMLA permits an employer to require that an employee submit a timely, complete, and sufficient certification to support a request for military caregiver leave under the FMLA leave due to a serious injury or illness of a covered veteran. If requested by the employer, your response is required to obtain or retain the benefit of FMLA-protected leave. 29 U.S.C. 2613, 2614(c)(3). Failure to do so may result in a denial of an employee's FMLA request. 29 CFR 825.310(f). The employer must give an employee at least 15 calendar days to return this form to the employer.

(This section must be completed before Section II can be completed by a health care provider.)

Part A: EMPLOYEE INFORMATION

Name and address of employer (this is the employer of the employee requesting leave to care for a veteran):

Name of employee requesting leave to care for a veteran:

First Middle Last

Name of veteran (for whom employee is requesting leave):

First Middle Last

Relationship of employee to veteran:

Spouse [] Parent [] Son [] Daughter [] Next of Kin [] (please specify relationship):

Part B: VETERAN INFORMATION

(1) Date of the veteran's discharge:

(2) Was the veteran **dishonorably** discharged or released from the Armed Forces (including the National Guard or Reserves)? Yes No

(3) Please provide the veteran's military branch, rank and unit at the time of discharge:

(4) Is the veteran receiving medical treatment, recuperation, or therapy for an injury or illness?
Yes No

Part C: CARE TO BE PROVIDED TO THE VETERAN

Describe the care to be provided to the veteran and an estimate of the leave needed to provide the care:

SECTION II: For completion by: (1) a United States Department of Defense (“DOD”) health care provider; (2) a United States Department of Veterans Affairs (“VA”) health care provider; (3) a DOD TRICARE network authorized private health care provider; (4) a DOD non-network TRICARE authorized private health care provider; or (5) a health care provider as defined in 29 CFR 825.125.

INSTRUCTIONS to the HEALTH CARE PROVIDER: The employee named in Section I has requested leave under the military caregiver leave provision of the FMLA to care for a family member who is a veteran. For purposes of FMLA military caregiver leave, a serious injury or illness means an injury or illness incurred by the servicemember in the line of duty on active duty in the Armed Forces (or that existed before the beginning of the servicemember’s active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and manifested itself before or after the servicemember became a veteran, and is:

- (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 servicemember unable to perform the duties of the servicemember’s office, grade, rank, or rating; or
- (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 such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or
- (iii) a physical or mental condition that substantially impairs the covered veteran’s ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or
- (iv) an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans’ Affairs Program of Comprehensive Assistance for Family Caregivers.

A complete and sufficient certification to support a request for FMLA military caregiver leave due to a covered veteran’s serious injury or illness includes written documentation confirming that the veteran’s injury or illness was incurred in the line of duty on active duty or existed before the beginning of the veteran’s active duty and was aggravated by service in the line of duty on active duty, and that the veteran is undergoing treatment, recuperation, or therapy for such injury or illness by a health care provider listed above. Answer fully and completely all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as “lifetime,” “unknown,” or “indeterminate” may not be sufficient to determine FMLA military caregiver leave coverage. Limit your responses to the veteran’s condition for which the employee is seeking leave. Do not provide information about genetic tests, as defined in 29 CFR 1635.3(f), or genetic services, as defined in 29 CFR 1635.3(e).

(Please ensure that Section I has been completed before completing this section. Please be sure to sign the form on the last page and return this form to the employee requesting leave (See Section I, Part A above). **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**)

Part A: HEALTH CARE PROVIDER INFORMATION

Health care provider’s name and business address:

Telephone: () _____ Fax: () _____ Email: _____

Type of Practice/Medical Specialty: _____

Please indicate if you are:

a DOD health care provider

a VA health care provider

a DOD TRICARE network authorized private health care provider

a DOD non-network TRICARE authorized private health care provider

other health care provider

PART B: MEDICAL STATUS

Note: If you are unable to make certain of the military-related determinations contained in Part B, you are permitted to rely upon determinations from an authorized DOD representative (such as, DOD Recovery Care Coordinator) or an authorized VA representative.

- (1) The Veteran's medical condition is:
- 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 servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating.
 - 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% or higher, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave.
 - A physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment.
 - An injury, including a psychological injury, on the basis of which the covered veteran is enrolled in the Department of Veterans' Affairs Program of Comprehensive Assistance for Family Caregivers.
 - None of the above.
- (2) Is the veteran being treated for a condition which was incurred or aggravated by service in the line of duty on active duty in the Armed Forces? Yes No
- (3) Approximate date condition commenced: _____
- (4) Probable duration of condition and/or need for care: _____
- (5) Is the veteran undergoing medical treatment, recuperation, or therapy for this condition? Yes No
- If yes, please describe medical treatment, recuperation or therapy:
- _____

PART C: VETERAN'S NEED FOR CARE BY FAMILY MEMBER

"Need for care" encompasses both physical and psychological care. It includes situations where, for example, due to his or her serious injury or illness, the veteran is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport him or herself to the doctor. It also includes providing psychological comfort and reassurance which would be beneficial to the veteran who is receiving inpatient or home care.

- (1) Will the veteran need care for a single continuous period of time, including any time for treatment and recovery? Yes No
- If yes, estimate the beginning and ending dates for this period of time: _____
- (2) Will the veteran require periodic follow-up treatment appointments? Yes No
- If yes, estimate the treatment schedule: _____

- (3) Is there a medical necessity for the veteran to have periodic care for these follow-up treatment appointments?
Yes No
- (4) Is there a medical necessity for the veteran to have periodic care for other than scheduled follow-up treatment appointments (e.g., episodic flare-ups of medical condition)? Yes No

If yes, please estimate the frequency and duration of the periodic care:

Signature of Health Care Provider: _____ Date: _____

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years, in accordance with 29 U.S.C. 2616; 29 CFR 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION; RETURN IT TO THE EMPLOYEE REQUESTING LEAVE (As shown in Section I, Part "A" above).**