

Employee Leaves: New Rights, Recurring Challenges

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Leave Laws, New and Old

- 2008 changes to Family and Medical Leave Act (FMLA)
- Two new forms of leave in Washington:
 - Spousal leave for military deployments
 - Domestic violence leave
- Questions on recurring leave issues

What's New with the FMLA?

- New qualifying reason for leave:
Qualifying exigency based on military duty status of employee's spouse, son, daughter or parent ("active duty leave")
- New leave entitlement:
Up to 26 weeks to care for employee's spouse, son, daughter, parent or next of kin injured in line of duty ("injured service member leave")

FMLA Eligibility Requirements Apply

- Employer of 50 or more employees
- Employee eligible after
 - 12 months of employment, and
 - at least 1,250 hours worked in 12-month period before leave

What is "Qualifying Exigency"?

- Not yet defined, but employers encouraged to assume liberal interpretation
- Expected to cover:
 - Child care arrangements
 - Legal and financial arrangements
 - Counseling related to service
 - Attending military ceremonies and events
 - Attending to personal business of service member

Leave to Care for Injured Service Member

- Service member may be employee's spouse, son, daughter, parent or next of kin
 - "Next of kin" means "nearest blood relative"
- Serious illness or injury incurred on active duty
- Ongoing treatment, therapy, recuperation
- 26 weeks total leave available

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Calculating the 26 Weeks

- If employee has already exhausted FMLA for birth of child, then needs leave for injured service member?
- If employee uses 20 weeks for injured service member, then needs leave for new baby?

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Same Job Protection as for Other FMLA Leaves

- Restoration to same or equivalent position
- Continuation of health insurance benefits on same basis as during employment
- No retaliation for use of leave

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Washington Leave for Spouse's Military Service

- Employees eligible if they work 20 or more hours per week on average, regardless of length of service
- Leave available only during period of military conflict
- 15 days of unpaid leave per deployment (employee option to substitute paid leave)
- Notice to employer required within 5 days of employee's receipt of notice of deployment

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Job Protection upon Return from Leave

- Return to same or equivalent job
- Benefit continuation at employee's cost during leave, unless employer provides or contributes per usual policy or CBA
- No accrual of seniority or other accrued benefits required during leave

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Differences from FMLA Active Duty Leave

- No minimum period of employment or number of work hours for eligibility
- Limited to 15 days (3 weeks) per deployment vs. 12 weeks per 12 months for qualified FMLA leave
- Limited to leave for employee's service member spouse only, not other family members

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Washington Domestic Violence Leave

- Purpose—to protect economic independence of abuse victims
- Victims may need time off due to
 - Injuries
 - Court proceedings
 - Safety concerns requiring legal protection
- Covers employers of any size, has no minimum service or hours for employee eligibility

Protected Leave

- "Reasonable" leave provided for employees who are victims or have family members who are victims of domestic violence, sexual assault or stalking
- Family members include child, spouse, parent-in-law, grandparent or person with whom employee has a dating relationship

Permissible Uses of Leave

- Legal or law enforcement assistance
- Treatment by health care provider for employee's injuries caused by abuse (or for family member victim's injuries)
- Assistance from shelter or crisis center
- Safety planning, relocation of domicile or similar actions

Required Documentation

- Advance notice per employer policy except in emergency
- Verification in a timely manner
 - Police report
 - Court order
 - Documents reflecting request for assistance
 - Employee's own written statement
 - Verification of family member relationship

Confidentiality of Information

- Information about employee's situation must be treated confidentially
- Disclosure permitted only if
 - Requested or consented to by employee
 - Ordered by a court
 - Otherwise required by law

Job Protection

- Maintenance of health insurance benefits to extent permitted by law for duration of leave
- Return to same or equivalent position
- Exceptions on return-to-work if employment is through staffing agency or for limited project

Other Provisions

- No retaliation permitted for use of leave
- Statute provides for civil action for an injunction, actual damages and costs, including attorney's fees
- Employment posters to be revised to include information about these leave rights

Questions You May Have

- What is "reasonable" leave?
- Can leave run concurrently with FMLA or other leaves, if applicable?
- May employee be reassigned, at least temporarily, if intermittent leave needed?
- How can employee's absence(s) be explained given confidentiality requirements?

Recurrent Questions under FMLA and Washington Law

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How Do You Coordinate FMLA Leave and Washington Maternity Disability Leave?

- 12 weeks FMLA leave for eligible employees is in addition to pregnancy disability leave required by Washington law
- Benefits coverage required under FMLA but may not be under pregnancy disability leave

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How Does Washington Family Care Act Interrelate with FMLA Leave?

- Family Care Act permits employees to use paid leave to care for a sick family member
- If situation also qualifies for FMLA and employee is eligible, FMLA leave can run concurrently with paid leave under Family Care Act
- Employee ineligible for FMLA leave may still have Family Care Act time off with pay

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What If Eligibility Circumstances Change While Employee Is on Leave?

- Employee crosses twelve month mark?
- Employer crosses 50 employee level?

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What If You Suspect FMLA Abuse?

- Obtain certification
- Can obtain second and third medical opinions, at your expense
- Can require re-certification at reasonable intervals, not more frequently than every 30 days

What Do You Do with an Employee Who Prefers Not to Use FMLA ?

- Not the employee's choice if you know that the situation qualifies
- May require the employee to provide medical certification
- Recognize interplay with obligation to accommodate disability, which may include leave

Do Employees Who Work More than 2,080 Hours per Year Earn More FMLA Credit?

- FMLA establishes minimum hours requirement, not a maximum, for eligibility
- 12 weeks leave is standard
 - May consider some recalculation if leave taken on intermittent basis

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Thank You!

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