

# NEED TIME?



## The Family and Medical Leave Act



U.S. Department of Labor  
Wage and Hour Division



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Presented by the  
U.S. Department of Labor  
Wage and Hour Division



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# Introduction to the FMLA

[§ 825.101](#)

- Purpose:
  - Balance work and family life
  - Promote economic security of families and serve national interest in preserving family integrity
- Shared Responsibilities:
  - Communication is key



# FMLA Works

- The FMLA has served as the cornerstone of the Department of Labor's efforts to promote work-life balance since President Clinton signed the legislation in 1993
- The best available evidence suggests that adopting flexible practices in the workplace potentially boosts productivity, improves morale, and benefits the economy



# FMLA Works

- The Family and Medical Leave Act codified a simple and fundamental principle: Workers should not have to choose between the job they need and the family members they love and who need their care
- The significance of the FMLA is in its recognition that workers aren't just contributing to the success of a business, but away from their jobs they are contributing to the health and well-being of their families



# Introduction to the FMLA

## Topics of Discussion:

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



# Employer Coverage

[§ 825.104](#)

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





# Employee Eligibility

§ 825.110

- 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



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# Employee Eligibility – Airline Flight Crew Employees

[§ 825.801](#)

- An airline flight crew employee meets the hours of service requirement if, during the previous 12-month period, he or she:
  - has worked or been paid for not less than 60 percent of the applicable monthly guarantee; and
  - has worked or been paid for not less than 504 hours, not including personal commute time, or time spent on vacation, medical, or sick leave.



# Qualifying Leave Reasons

[§ 825.112](#)

- 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

## – Military Family Leave

- 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

## § 825.122

- **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 in the state where the employee was married and includes individuals in a same-sex marriage or common law 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

## [§ 825.120-121](#)

- 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

[§ 825.113](#)

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

- Inpatient Care, or
- Continuing Treatment by a Health Care Provider



# Serious Health Condition – Inpatient Care

[§ 825.114](#)

- An overnight stay in a hospital, hospice, or residential medical facility
- Includes any related incapacity or subsequent treatment



# Serious Health Condition – Continuing Treatment

[§ 825.115](#)

## Continuing Treatment by a Health Care Provider

- Incapacity Plus Treatment
- Pregnancy
- Chronic Conditions
- Permanent/Long-term Conditions
- Absence to Receive Multiple Treatments



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# Continuing Treatment by a Health Care Provider

§ 825.115

## Incapacity Plus Treatment

- 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)



# Continuing Treatment by a Health Care Provider

[§ 825.115](#)

## Pregnancy

- Incapacity due to pregnancy or prenatal care



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# Continuing Treatment by a Health Care Provider

§ 825.115

## Chronic Conditions

- Any period of incapacity or treatment due to a chronic serious health condition, which is defined as a condition that:
  - requires periodic visits (twice per year) to a health care provider for treatment
  - continues over an extended period of time
  - may cause episodic rather than continuing periods of incapacity



# Continuing Treatment by a Health Care Provider

[§ 825.115](#)

## Permanent/Long-Term Conditions

- A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective



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# Continuing Treatment by a Health Care Provider

§ 825.115

## 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

[§ 825.200, 825.205 & 825.802](#)

- 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.

\* Eligible airline flight crew employees are entitled to 72 days of FMLA leave



# Amount of Leave – Intermittent Leave

## § 825.202

- 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



# Amount of Leave – Intermittent Leave

## § 825.205

- 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 apply for calculating leave for airline flight crew employees





# Amount of Leave – Special Rules

[§ 825.200 - 205](#)

- 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

[§ 825.200](#)

## 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

## § 825.207

- “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



# Substitution of Paid Leave – Limitations

## § 825.207

- Workers' compensation leave
  - may count against FMLA entitlement
  - “topping off” allowed if state law permits
- Disability leave
  - may count against FMLA entitlement
  - “topping off” allowed if state law permits
- Compensatory time off (public sector only)
  - may count against FMLA entitlement
  - subject to FLSA requirements



# 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

## § 825.300

- 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 CMP for willful posting violation



# Employer Responsibilities – Provide Notice of Eligibility

## § 825.300

- 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 Rights and Responsibilities

[§ 825.300](#)

- Provided when eligibility notice required
- Must be in writing (optional WH-381)
- Notice must include:
  - Statement that leave may be counted as FMLA
  - Applicable 12-month period for entitlement
  - Certification requirements
  - Substitution requirements
  - Arrangements for premium payments (and potential employee liability)
  - Status as “key” employee
  - Job restoration and maintenance of benefits rights



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# Employer Responsibilities – Provide Notice of Designation

## [§ 825.300](#)

- 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



# Employer Responsibilities – Provide Notice of Designation

[§ 825.300 - .301](#)

- Employer must notify employee of the amount of leave counted against entitlement, if known; may be payroll notation
- If amount of leave is unknown (e.g., unforeseeable leave), employer must inform employee of amount of leave designated upon request (no more often than 30 days)
- Retroactive designation permitted provided that failure to timely designate does not cause harm to employee



## Employer Responsibilities –

# Maintain Group Health Plan Benefits

[§ 825.209](#)

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



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# Employer Responsibilities – Maintain Group Health Plan Benefits

[§ 825.210 - .213](#)

- 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

[§ 825.214 - .219](#)

- 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



# Prohibited Employment Actions

[§ 825.220](#)

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

[§ 825.500](#)

- 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

[§ 825.302 - .303](#)

- 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
- Comply with employer's usual and customary procedural requirements for requesting leave absent unusual circumstances



# Employee Responsibilities – Notice Requirements

- Timing of Employee notice of need for leave:
- Foreseeable Leave - 30 days notice, or as soon as practicable  
[§ 825.302](#)
- Unforeseeable Leave - as soon as practicable  
[§ 825.303](#)



# Employee Responsibilities – Provide Certification

[§ 825.305](#)

- 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



# Employee Responsibilities – Provide Certification

[§ 825.307](#)

- 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
- 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



# Employee Responsibilities – Provide Certification

§ 825.308 & .313

- 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

[§ 825.311](#)

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



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# Employee Responsibilities – Fitness-for-Duty Certification

§ 825.312

- 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



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# Other Issues

- Salaried employees:  
[§ 825.206](#)
  - Deductions from certain “exempt” employees’ salaries
  - Deductions for employees paid overtime on a fluctuating workweek method
- Special rules for schools  
[§ 825.600-.604](#)







# MILITARY FAMILY LEAVE

## Under the Family and Medical Leave Act



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# 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

[§ 825.126](#)

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

\* Eligible airline flight crew employees are entitled to 72 days



# Qualifying Exigency Leave – Covered Active Duty

[§ 825.126](#)

- **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

## § 825.126

- 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

§ 825.309

- 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

## § 825.127

- 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
- 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

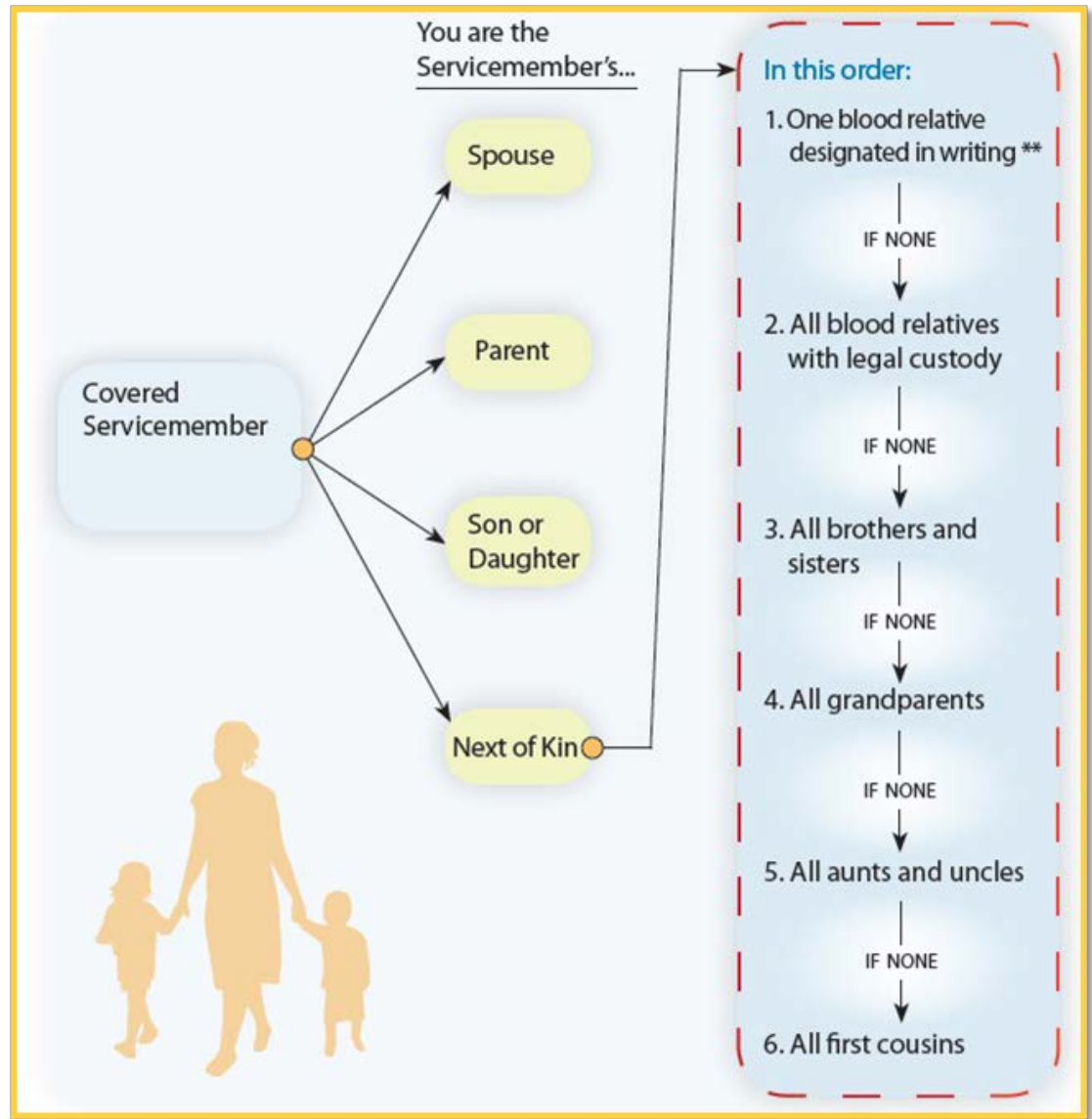
\* Eligible airline flight crew employees are entitled to 156 days



# Qualifying Family Relationships Under Military Caregiver Leave

## § 825.127

\*\*Designated for purposes of military caregiver leave under the FMLA.





# Covered Servicemember

[§ 825.127](#)

A **covered servicemember** may be:

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



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# Covered Current Servicemember

[§ 825.127](#)

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



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# Current Servicemember – Serious Injury or Illness

[§ 825.127](#)

- 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

[§ 825.310](#)

- 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

[§ 825.127](#)

- 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\*
- \* Special rules may apply if the servicemember was discharged before March 8, 2013



# Veteran Serious Injury or Illness

[§ 825.127](#)

- 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



# Veteran Serious Injury or Illness

[§ 825.127](#)

(continued)

- 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

## § 825.310

- 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
- Limited second and third opinions





# Employee Responsibilities – Certification for a Veteran

## § 825.310

- 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

[§ 825.127](#)

- “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

## § 825.400

- 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



# FMLA Compliance Assistance Materials

- Title I of the FMLA, as amended (29 U.S.C. 2601—2654)
- The Regulations (29 C.F.R. Part 825)
- The Employee’s Guide to the FMLA
- The Employee’s Guide to Military Family Leave under the FMLA
- FMLA Forms
- FMLA Fact Sheets
- FMLA Poster (WH-1420)
- FMLA Frequently Asked Questions
- FMLA elaws Advisor



# Additional Information

- **Visit the WHD homepage at:**  
<http://www.wagehour.dol.gov>
- **Call the WHD toll-free information and helpline at**  
1-866-4US-WAGE (1-866-487-9243)
- **Call or visit the nearest Wage and Hour Division Office**

