New York University
UNIVERSITY POLICIES

Title: Federal FMLA Policy and Procedure – New York & District of Columbia
Effective Date: January 1, 2018
Supersedes: September 1, 2016
Issuing Authority: Executive Vice President
Responsible Officer: Human Resources

Statement of Policy

In accordance with the terms and conditions of this Policy, New York University (“University”) will provide unpaid, job-protected leave under the federal Family and Medical Leave Act (“FMLA”) and applicable regulations to eligible employees working in New York and the District of Columbia. As detailed below, this Policy sets forth the eligibility requirements for FMLA leave, the conditions for using leave, the process for requesting leave, and other related provisions.

To Whom the Policy Applies

Subject to the conditions listed in items (a)-(c) below, employees are eligible for FMLA leave if they have been employed with the University for at least 12 months (whether in New York or D.C.) and if they have worked for at least 1,250 hours (whether in New York or D.C.) during the 12 month period immediately preceding commencement of the leave (hereinafter, “eligible employee”).

➢ a. The 12 months of service with the University need not be consecutive months and time previously worked for the University may be used to meet the 12-month requirement. However, the University need not consider any period of previous employment occurring more than seven (7) years before the date of the employee’s most recent hire, unless the break is due to service covered by the Uniformed Services Employment and Reemployment Rights Act (USERRA), or there is a written agreement outlining the University’s intention to rehire the employee after the break in service.

➢ b. All periods of time worked during the 12-month period preceding commencement of leave count for purposes of meeting the “1,250 hours” requirement. Time taken for holidays, vacation, or leave is not considered work time except that an employee returning from his or her USERRA-covered service obligation shall be credited with the hours of service that would have been performed but for the period of absence due to or necessitated by USERRA-covered service.

➢ c. For eligible employees covered by a collective bargaining agreement (“CBA”), please also refer to the applicable CBA for any provisions on FMLA leave. Nothing set forth in this Policy shall be construed to impede, infringe, or diminish the rights and benefits
afforded under a CBA. Should this Policy conflict with any of the provisions of a CBA, the CBA shall prevail.

Policy and Procedures

FMLA Leave Entitlement

An eligible employee may receive up to 12 workweeks (or the equivalent of 60 work days) of FMLA leave during a 12 month period (as defined below) for any one or combination of the following qualifying reasons:

➢ The birth of a son or daughter, and to care for a newborn child; or the placement with the employee of a son or daughter for adoption or foster care (hereinafter, “bonding leave”);

➢ The care of an employee's spouse, son, daughter, or parent with a serious health condition;

➢ The employee's own serious health condition that renders the employee unable to perform his or her job duties; or

➢ For a qualifying exigency while the employee's spouse, son, daughter, or parent (the covered military member) is on covered active duty, or is on notice of an impending call or order to covered active duty status.

The 12 month period in which an eligible employee may take the FMLA leave described above is calculated on a "rolling" basis measured backward from the date the employee first uses such leave. That is, each time an employee takes such FMLA leave the remaining leave entitlement would be any balance of the 12 weeks of leave that had not been used during the immediately preceding 12 months.

In the event an employee and his/her spouse are both employees of the University, the spouses may only take to a combined total of 12 workweeks during a 12 month period for the birth and care of a newborn child, placement of a child in adoptive or foster care, or care for a parent with a serious health condition.

Leave for the birth and care of a newborn child, or placement of a child in adoptive or foster care, must conclude within 12 months of the birth or placement.

Military Caregiver FMLA Leave Entitlement

An eligible employee may receive up to 26 workweeks of FMLA leave during a 12 month period (as defined below) to care for a covered service member with a serious injury or illness if the employee is the spouse, son, daughter, parent or next of kin of the service member (hereinafter, “military caregiver leave”).

The 12 month period in which an eligible employee may take military caregiver leave is measured on a forward going basis, beginning on the first day the employee takes such leave and ending 12 months after that date.
Please note that an eligible employee may take no more than a combined total of 26 work weeks of leave for any FMLA-qualifying reason during a 12 month period and, during that period, the employee may not take more than 12 workweeks for FMLA leave that has not been designated as military caregiver leave.

In the event an employee and his/her spouse are both employees of the University, the spouses may only take a combined total of 26 workweeks during a 12 month period for the birth and care of a newborn child, placement of a child in adoptive or foster care, care for the child after placement, care for a parent with a serious health condition, or care for a covered service member with a serious injury or illness.

**Intermittent or Reduced FMLA Leave**

An eligible employee may take intermittent (in blocks of time) or reduced FMLA leave under the following circumstances:

- for an employee’s own serious health condition, to care for a spouse, parent, son or daughter with a serious health condition, or to care for a covered service member’s serious injury or illness, where there is a medical need for such leave that can be best accommodated through an intermittent or reduced schedule;

- when medically necessary for planned and/or unanticipated medical treatment of a serious health condition or a covered service member’s serious injury or illness, or for recovery from treatment, a serious health condition, or a covered service member’s injury or illness;

- to provide care or psychological comfort to a covered family member with a serious health condition or to a covered service member with a serious injury or illness; or

- for a qualifying exigency (as that term is defined above).

The University will account for intermittent or reduced leave using increments no greater than the shortest period of time that the University uses to account for use of other forms of leaves (within the employee's classification group) provided that the increment is not greater than one hour and that the employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken.

Employees who require intermittent or reduced schedule leave for a planned medical treatment should make a reasonable effort to schedule their leave to minimize disruption of their department's operations.

During any period of intermittent leave or reduced schedule, the University reserves the right to transfer the employee to an alternative position, with equivalent pay and benefits, for which the employee is qualified and which may better accommodate the periods of leave than the employee's regular position.
The Process for Requesting FMLA Leave

1. Where the need for FMLA leave is foreseeable, the employee shall inform Liberty Mutual (the University's FMLA administrator) and his or her supervisor of the need for leave at least 30 days before the leave is scheduled to begin, where practicable. Where the need for leave is unforeseeable, the employee shall inform Liberty Mutual and his or her supervisor as soon as practicable. The employee may report a claim through one of the following means: online (using MyLibertyConnections® at https://www.mylibertyconnection.com); telephonically (at 888-339-6830); or paper (by completing the form available here). First time users of the MyLibertyConnection online portal must register using Company Code NEWYORKUNIV.

2. When an employee requests FMLA leave, or when the University acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employee shall be notified within 5 business days, absent extenuating circumstances, whether she or he is eligible for FMLA leave. If eligible, the employee will be provided with his or her Notice of Eligibility and FMLA Rights and Responsibilities, as well as any required certification.

3. If certification is required, the employee must provide a completed certification to Liberty Mutual within 30 calendar days of the request for certification. As appropriate, the employee may be required to furnish a certification from a health care provider for the employee's leave: (i) to care for the employee's covered family member with a serious health condition or (ii) due to the employee's own serious health condition that renders him or her unable to perform the essential functions of the position. The employee also may be required to furnish a certification for leave because of a qualifying exigency or to care for a covered servicemember with a serious injury or illness, as applicable. The contents of the certifications must be in accordance with the FMLA. Where a certification by a foreign health care provider is in a language other than English, the employee must provide Liberty Mutual with a written translation of the certification upon request. Failure to furnish the appropriate certification in a timely fashion may result in a delay or denial of an employee's FMLA leave.

4. The employee may be required to correct any deficiencies in the certification within 7 days. Where the certification is for an employee’s serious health condition or for a family members’ serious health condition, the employee may be required to obtain a second medical opinion if the University doubts the validity of the certification, or to obtain a third medical opinion if the first and second opinions differ.

5. When the University has the information necessary to determine if leave is FMLA protected, within 5 business days, the employee must be notified whether the leave will be designated as FMLA leave and, if possible, how much leave will be counted against his or her FMLA entitlement. Note that the University may preliminarily designate absences for more than 3 consecutive days as FMLA Leave. If the University determines that the leave is not covered by the FMLA, the employee must be notified of that determination.

6. Recertification may be requested for the serious health condition of the employee or the employee’s family member no more frequently than every 30 days unless circumstances have changed significantly, or if the University receives information casting doubt on the reason given for the absence, or if the employee requests an extension of his or her leave.
Health Benefits

Group health benefit coverage will be maintained on the same basis as coverage would have been provided had the employee been continuously employed during the FMLA leave period.

Any share of group health plan premiums which had been paid by the employee prior to FMLA leave must continue to be paid by the employee during the FMLA leave period.

If the employee's premium payment obligations under the applicable plan are not covered by the employee's paycheck, the employee must provide the University with a check or money order in the appropriate amount.

In the event that an employee fails to return from leave, he or she may be required to reimburse the University for any health insurance contributions made during any unpaid period of leave, in accordance with the FMLA.

Job Restoration and Fitness for Duty Certification

Employees generally have the right to return to their position or a position of equivalent pay, benefits, and working conditions, upon completion of their FMLA leave. When FMLA leave was taken due to an employee's serious health condition, the employee may be required to provide an acceptable fitness for duty certificate prior to reinstatement. Failure to provide such certification, or failure to return to work as scheduled after the exhaustion of FMLA leave, may result in a denial of job reinstatement or termination from employment.

An employee is not entitled to job restoration in circumstances where the employee would not have been employed at the time reinstatement is requested, regardless of FMLA status, due to reorganization, reduction in force, or if the employee was a "key employee" and reinstatement would cause "substantial and grievous economic injury" to the University.

Other University Leaves

FMLA leave shall run concurrently with leave taken under other applicable laws or University policies in the manner set forth below.

For purposes of this section, the following abbreviations have the following meanings:

- **D.C. FMLA** - refers to leave taken under the District of Columbia Family and Medical Leave Act.
- **FMLA** - refers to leave taken under the federal Family and Medical Leave Act.
- **NYDBL** – refers to statutory short-term disability benefits received under the New York Disability Benefits Law.
- **NYPFL** – refers to paid family leave benefits received under the New York Paid Family Leave Law.
- **PBL** – refers to paid parental bonding leave received under the University’s Parental Bonding Leave Policy or the Faculty Handbook.
➢ WC – refers to worker’s compensation benefits received under the applicable Worker’s Compensation Law.

_Bonding Leave._ FMLA bonding leave shall run concurrently with leave taken under the following laws and University policies, as follows:

(1) **NYU-NY**

<table>
<thead>
<tr>
<th>Eligibility</th>
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<tbody>
<tr>
<td>Employee is eligible for FMLA, NYPFL, and PBL at the same time.</td>
<td>FMLA, NYPFL, and PBL shall run concurrently.</td>
<td>Employee paid 100% PBL salary and not NYPFL benefit rate.</td>
</tr>
<tr>
<td>Employee is eligible for only FMLA and PBL at the same time.</td>
<td>FMLA and PBL shall run concurrently.</td>
<td>Employee paid 100% PBL salary.</td>
</tr>
<tr>
<td>Employee is eligible for only FMLA and NYPFL at the same time.</td>
<td>FMLA, NYPFL, and any unused, accrued Vacation/Personal Days shall run concurrently.</td>
<td>Where accrued Vacation/Personal Days run concurrently, Employee will be paid 100% salary, and not the NYPFL benefit rate. Where an Employee does not have any unused, accrued Vacation/Personal Days, Employee will be paid the NYPFL benefit rate.</td>
</tr>
<tr>
<td>Employee is eligible for FMLA only.</td>
<td>FMLA and any unused, accrued Vacation/Personal Days shall run concurrently.</td>
<td>Where accrued Vacation/Personal Days run concurrently, Employee will be paid 100% salary. Where Employee does not have any unused, accrued Vacation/Personal Days, FMLA is unpaid.</td>
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(2) **NYU-Washington, D.C.**

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<tbody>
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<td>Employee is eligible for FMLA, D.C. FMLA, and PBL at the same time.</td>
<td>FMLA, D.C. FMLA, and PBL shall run concurrently.</td>
<td>Employee paid 100% PBL salary.</td>
</tr>
<tr>
<td>Employee is eligible only for FMLA and PBL at the same time.</td>
<td>FMLA and PBL shall run concurrently.</td>
<td>Employee paid 100% PBL salary.</td>
</tr>
<tr>
<td>Employee is eligible only for FMLA and D.C. FMLA at the same time.</td>
<td>FMLA, D.C. FMLA, and any unused, accrued Vacation/Personal Days shall run concurrently.</td>
<td>Where accrued Vacation/Personal Days run concurrently, Employee will be paid 100% salary. Where Employee does not have any unused, accrued Vacation/Personal Days, FMLA/DC FMLA is unpaid.</td>
</tr>
<tr>
<td>Employee is eligible for FMLA only.</td>
<td>FMLA and any unused, accrued Vacation/Personal Days shall run concurrently.</td>
<td>Where accrued Vacation/Personal Days run concurrently, Employee</td>
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<td>Days shall run concurrently.</td>
<td>will be paid 100% salary.</td>
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<td>Where Employee does not have any unused, accrued Vacation/Personal Days, FMLA is unpaid.</td>
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**Caring for a Spouse, Son, Daughter, or Parent with a Serious Health Condition.**

FMLA leave used to care for a spouse, son, daughter, or parent with a serious health condition shall run concurrently with leave taken under the following laws and University policies, as follows:

1. **NYU-NY**

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<tr>
<td>Employee is eligible for FMLA and NYPFL at the same time.</td>
<td>(1) FMLA, NYPFL, and any unused, accrued Paid Sick Leave (for family members) shall first run concurrently.</td>
<td>Where accrued Paid Sick Leave (for family members) or Vacation/Personal Days run concurrently, Employee will be paid 100% salary, and not the NYPFL benefit rate.</td>
</tr>
<tr>
<td></td>
<td>(2) Upon exhaustion of the employee’s Paid Sick Leave (for family members), FMLA, NYPFL, and any unused, accrued Vacation/Personal Days shall then run concurrently.</td>
<td>Where an Employee does not have any unused, accrued Paid Sick Leave (for family members) or Vacation/Personal Days, Employee will be paid the NYPFL benefit rate.</td>
</tr>
</tbody>
</table>

| Employee is eligible for FMLA only. | (1) FMLA and any unused, accrued Paid Sick Leave (for family members) shall first run concurrently. | Where accrued Paid Sick Leave (for family members) or Vacation/Personal Days run concurrently, Employee will be paid 100% salary. |
|                                 | (2) Upon exhaustion of the employee’s Paid Sick Leave (for family members), FMLA and any unused, accrued Vacation/Personal Days shall then run concurrently. | Where Employee does not have any unused, accrued Paid Sick Leave (for family members) or Vacation/Personal Days, FMLA is unpaid. |
Employee is eligible for FMLA and D.C. FMLA at the same time.

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<td>Employee is eligible for FMLA and D.C. FMLA at the same time.</td>
<td>1) FMLA, D.C. FMLA, and any unused, accrued Paid Sick Leave (for family members) shall first run concurrently. (2) Upon exhaustion of the employee’s Paid Sick Leave (for family members), FMLA, D.C. FMLA, and any unused, accrued Vacation/Personal Days shall then run concurrently.</td>
<td>Where accrued Paid Sick Leave (for family members) or Vacation/Personal Days run concurrently, Employee will be paid 100% salary. Where Employee does not have any unused, accrued Paid Sick Leave (for family members) or Vacation/Personal Days, FMLA/D.C. FMLA is unpaid.</td>
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Employee is eligible for FMLA only.

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<tr>
<td>Employee is eligible for FMLA only.</td>
<td>1) FMLA and any unused, accrued Paid Sick Leave (for family members) shall first run concurrently. (2) Upon exhaustion of the employee’s Paid Sick Leave (for family members), FMLA and any unused, accrued Vacation/Personal Days shall then run concurrently.</td>
<td>Where accrued Paid Sick Leave (for family members) or Vacation/Personal Days, Employee will be paid 100% salary. Where Employee does not have any unused, accrued Paid Sick Leave (for family members) or Vacation/Personal Days, FMLA is unpaid.</td>
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**Employee's Serious Health Condition.**

FMLA leave used to care for an employee with a serious health condition shall run concurrently with leave taken under the following laws and University policies, as follows:

1) NYU-NY

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| Employee is eligible for FMLA and NYDBL at the same time. | (1) FMLA and any unused, accrued Paid Sick Leave shall first run concurrently. (2) Upon exhaustion of Paid Sick Leave, FMLA shall then run concurrently with NYDBL. | (1) Employee will be paid 100% salary while on Paid Sick Leave. (2) Employee will be paid NYDBL benefit rate while receiving NYDBL.
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<td>Employee is eligible for FMLA and WC at the same time.</td>
<td>(1) FMLA and any unused, accrued Paid Sick Leave shall first run concurrently. (2) Upon exhaustion of Paid Sick Leave, FMLA shall then run concurrently with WC.</td>
<td>(1) Employee will be paid 100% salary while on Paid Sick Leave. (2) Employee will be paid WC benefit rate while on WC.</td>
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Employee is eligible for FMLA only. | (1) FMLA and any unused, accrued Paid Sick Leave shall first run concurrently. (2) Upon exhaustion of Paid Sick Leave, FMLA and any unused, accrued Vacation/Personal Days shall then run concurrently. | Where accrued Paid Sick Leave or Vacation/Personal Days run concurrently, Employee will be paid 100% salary. Where Employee does not have any unused, accrued Paid Sick Leave or Vacation/Personal Days, FMLA is unpaid. |

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<td>Employee is eligible for FMLA, D.C. FMLA, and WC at the same time.</td>
<td>(1) FMLA, D.C. FMLA, and any unused, accrued Paid Sick Leave shall first run concurrently. (2) Upon exhaustion of Paid Sick Leave, FMLA and D.C. FMLA shall then run concurrently with WC.</td>
<td>(1) Employee will be paid 100% salary while on Paid Sick Leave. (2) Employee will be paid WC benefit rate while on WC.</td>
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Employee is eligible only for FMLA and WC at the same time only. | (1) FMLA and any unused, accrued Paid Sick Leave shall first run concurrently. (2) Upon exhaustion of Paid Sick Leave, FMLA shall then run concurrently with WC. | (1) Employee will be paid 100% salary while on Paid Sick Leave. (2) Employee will be paid WC benefit rate while on WC. |

Employee is eligible only for FMLA and D.C. FMLA at the same time. | (1) FMLA, D.C. FMLA, and any unused, accrued Paid Sick Leave shall first run concurrently. (2) Upon exhaustion of Paid Sick Leave, FMLA and any unused, accrued Vacation/Personal Days shall then run concurrently. | Where accrued Paid Sick Leave or Vacation/Personal Days run concurrently, Employee will be paid 100% salary. Where Employee does not have any unused, accrued Paid Sick Leave or Vacation/Personal Days, FMLA/D.C. FMLA is unpaid. |

(2) NYU-<i>Washington, D.C.</i>
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<td>Employee is eligible for FMLA only.</td>
<td>(1) FMLA and any unused, accrued Paid Sick Leave shall first run concurrently. (2) Upon exhaustion of Paid Sick Leave, FMLA and any unused, accrued Vacation/Personal Days shall then run concurrently.</td>
<td>Where accrued Paid Sick Leave or Vacation/Personal Days run concurrently, Employee will be paid 100% salary. Where Employee does not have any unused, accrued Paid Sick Leave or Vacation/Personal Days, FMLA is unpaid.</td>
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**Qualifying Exigency.** FMLA leave used for a “qualifying exigency” shall run concurrently with leave taken for this purpose under the New York Paid Family Leave Law (NYPFLL).

**Holidays.** When a holiday falls during a week in which an employee is taking the full week of FMLA leave, the entire week is counted as FMLA leave. However, when a holiday falls during a week when an employee is taking less than the full week of FMLA leave, the holiday is not counted as FMLA leave, unless the employee was scheduled and expected to work on the holiday and used FMLA leave for that day.

**Additional Options.** If the employee is unable to return to work upon the exhaustion of his or her FMLA leave the employee may take or continue to take any other leave for which the employee is eligible under any other applicable laws or University policies; pursue disability options; or seek an accommodation, as appropriate. At no point shall any continued leave be counted as FMLA leave unless and until the employee again satisfies the eligibility requirements.

**Definitions**

*All definitions set forth in this section are to be read in accordance with the FMLA and applicable regulations.

**Adoption** means legally and permanently assuming the responsibility of raising a child as one's own. The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for FMLA leave.

**Covered Active Duty** for members of a regular component of the Armed Forces means duty during deployment of the member of the Armed Forces to a foreign country. For members of the reserve components of the Armed Forces (members of the U.S. National Guard and Reserves), the term means duty during deployment of the member with the Armed Forces to a foreign country under a call or order to active duty in a contingency operation, as defined under applicable law.

**Covered Service Member** means a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious illness, or a covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness.
Outpatient Status with respect to a covered service member, means the status of a member of the Armed Forces assigned to:

a. a military medical treatment facility as an outpatient; or

b. a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

*Foster care* is 24-hour care for children in substitution for, and away from, their parents or guardian. Such placement is made by or with the agreement of the State as a result of a voluntary agreement between the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves agreement between the State and foster family that the foster family will take care of the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody.

*Health Care Provider* includes, as defined by the FMLA, the following professionals:

a. doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the state in which the doctor practices,

b. podiatrist,

c. dentist,

d. clinical psychologist,

e. optometrist,

f. chiropractor,

g. nurse practitioner,

h. nurse-midwife,

i. physician assistant,

j. Christian Scientist practitioner,

k. clinical social worker, or

l. any other persons determined by the United States Secretary of Labor to be capable of providing health care services.

*Key Employee* means a salaried FMLA-eligible employee who is paid in the highest 10% of all employees employed by the University within 75 miles of the employee’s worksite.

*Leave because of a qualifying exigency* applies where the employee’s spouse, son, daughter, or parent (the "covered military member") is on covered active duty or called to covered active duty status for one or more of the following qualifying exigencies as defined under the FMLA:

1. Short-notice deployment
2. Military events and related activities
3. Childcare and school activities
4. Financial and legal arrangements
5. Counseling
6. Rest and Recuperation
7. Post Deployment activities
8. Parental Care
9. Additional activities
**Next of kin of a covered service member** means 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 or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered service member, all such family members shall be considered the covered service member's next of kin and may take FMLA leave to provide care to the covered service member, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered service member’s only next of kin.

**Parent** means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined below. This term does not include parents "in law."

**Parent of a covered service member** means a covered service member's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered service member. This term does not include parents "in law."

**Serious health condition** means an illness, injury, impairment or physical or mental condition that involves any one of the following:

a. Inpatient care for an overnight stay in a hospital, hospice or residential medical care facility, or any subsequent treatment in connection with such inpatient care.

b. Continuing treatment by a health care provider for any one of the following:

   i. A period of incapacity for more than three consecutive, full calendar days and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

      aa. Treatment two or more times by a health care provider (or agent thereof as defined by the FMLA) within 30 days of the first incapacity, unless extenuating circumstances exist or,

      bb. Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the provider.

   ii. A period of incapacity due to pregnancy or for prenatal care.

   iii. A period of incapacity or treatment due to a chronic serious health condition, which:

      aa. Requires periodic visits (defined as at least twice a year) for treatment by a health care provider (or agent thereof as defined by the FMLA),
bb. Continues over an extended period of time, and

c. A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. Examples include: Alzheimer's, a severe stroke or terminal stages of a disease.

d. A period of absence to receive multiple treatments by a health care provider or by the provider of healthcare services under orders of or on referral by a health care provider, either for restorative surgery after an accident or injury, or for a condition that would likely result in a period of incapacity for more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer, severe arthritis or kidney disease.

e. Absences attributable to incapacity under paragraph (b)(ii)-(iii) of this section qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee’s health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

Note: Unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraines, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition. Mental illness or allergies may be serious health conditions, but only if all the conditions of this section are met.

**Serious Injury or Illness for a Service Member.**

- In the case of a member of the Armed Forces including a member of the National Guard or Reserves, means an injury or illness incurred by the member in the line of duty on active duty in the Armed Forces or that existed before the beginning of the member’s active duty and was aggravated by service in the line of duty on active duty in the Armed Forces and that may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating.

- In the case of a covered veteran, means an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member’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 member 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.

Son or daughter means 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 age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability" at the time that FMLA leave is to commence.

(1) "Incapable of self-care" means that the individual requires active assistance or supervision to provide daily self-care in three or more of the "activities of daily living" (ADLs) or "instrumental activities of daily living" (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

(2) "Physical or mental disability" means a physical or mental impairment that substantially limits one or more of the major life activities of an individual, as defined by applicable law and regulations.

(3) Persons who are "in loco parentis" include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

Son or daughter of a covered service member means 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.

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

Spouse 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. State means any State of the United States or the District of Columbia or any Territory or possession of the United States.