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## **The Family and Medical Leave Act and Public Safety Personnel**

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*This is Part 2 of a two-part article. To read Part 1, click [here](#).*

### ❖ **Family Leave**

The Family and Medical Leave Act, in addition to allowing employees to take unpaid leave for their own serious medical conditions, also allows such leave for the care of a sick family member. This includes leave for the birth of a son or daughter, or placement of a child with the employee for either adoption or foster care. It also includes leave to care for a spouse, son, daughter, or parent who has a serious health condition.

It will not, however, under the current statute and regulations, protect requests for leave to take care of a boyfriend or girlfriend, even if there is a live-in relationship, and it certainly will not protect requests for leave to take care of a mere friend or neighbor, regardless of how serious their circumstances. Nor does it currently appear to cover leave to take care of an ill sibling or a more distant relative such as an in-law, aunt, uncle, niece, nephew, or cousin.

The 2008 amendments to the FMLA for military family members extend the FMLA's protection to next of kin and to adult children for leave under that provision. Under other provisions, it generally is children under the age of 18 who can be cared for. Children over the age of 18 only qualify in the limited circumstances that the child is "incapable of self-care" because of a serious disability that impacts one of the "major life activities."

The Department of Labor on June 22, 2010 clarified the definition of “son and daughter” under the FMLA “to ensure that an employee who assumes the role of caring for a child receives parental rights to family leave regardless of the legal or biological relationship” and specifying that “an employee who intends to share in the parenting of a child with his or her same-sex partner will be able to exercise the right to FMLA leave to bond with that child.”

In February 2015, the Department of Labor issued its final rule amending the definition of spouse under the FMLA in response to the decision in [\*United States v. Windsor\*](#), #12-307, 133 S. Ct. 2675 (2013), striking down the federal Defense of Marriage Act, effective March 27, 2015. The revised definition of “spouse” extends FMLA leave rights and job protections to eligible employees in a same-sex marriage or a common-law marriage entered into in a state where those statuses are legally recognized, regardless of the state in which the employee works or resides. With the recent legalization of same-sex marriage nationwide, spouse will now uniformly include same sex spouses.

### ***Care for ill family members***

There are numerous cases in which courts have addressed the issues surrounding unpaid leave under the statute to care for ill family members such as a parent or spouse. In [\*Ballard v. Chicago Park Dist.\*](#), #13-1445, 741 F.3d 838 (7th Cir. 2014), for instance, a public employee’s mother was diagnosed with end-stage heart failure. The employee acted as her mother’s caregiver, administering insulin, draining fluid from her heart, and bathing and dressing her. The employee requested unpaid leave from her job to accompany her dying mother on a six-day trip to Las Vegas to fulfill her dying mother’s lifelong dream. The employer denied the request, but the employee claimed that she was not notified of the denial before going on the trip.

Months after the trip, the employer terminated the employee for alleged unauthorized absences during the trip. A federal appeals court upheld a trial court’s ruling in favor of the terminated employee on a claim under the Family and Medical Leave Act, authorizing unpaid leave to care for relatives, including a parent with a serious health condition. The lower court had stated that “where the care takes place has no bearing on” protection for family leave under the statute, and denied summary judgment to the employer.

In [\*Dawkins v. Fulton County\*](#), #12-11951 733 F.3d 1084 (11th Cir. 2013), a county employee filed suit under the Family and Medical Leave Act, claiming that she was improperly demoted in retaliation for having left work to take care of her ill uncle. The trial court granted summary judgment to the defendants. On appeal, the court rejected the plaintiff’s argument that the employer was equitably estopped from disputing her eligibility for leave because her manager had approved it. Assuming for the purposes of

argument that equitable estoppel under federal common law applied to the Family Medical Leave Act, the plaintiff failed to assert a valid case for estoppel in this case. She failed to show that she relied on any misrepresentation. And, as the court briefly noted, caring for a sick uncle was not protected.

In some instances, courts or arbitrators have extended the boundaries of family a bit beyond the strict definitions of the statute. In *County of Allegheny and A.C. Prison Employees*, 122 LA (BNA) 155, Pa. Bur. of Mediation Grievance #5720 (Miles, 2005), for instance, an arbitrator held that a county violated the law when it denied FMLA leave to employee to care for her grandmother with Alzheimer's disease. The employee was required to show that grandmother served as her parent when she was child and that the employee stood in loco parentis.

In *McAlester, City of and IAFF L- 2284*, FMCS Case #00124-04902-8, 114 LA (BNA) 1180 (Crow, 2000), it was ruled that a firefighter was not entitled to sick leave to care for a live-in woman who was pregnant with his child. Neither the FMLA nor the collective bargaining agreement defined her as a domestic relative.

It will not avail the employer to object to a request for leave to care for an ill family member by pointing to the fact that there are other family members who could care for that individual. Illustrating this is [\*Roman v. Michigan Department of Human Services\*](#), #10-2174, 668 F.3d 826 (6th Cir. 2012). In this case, a Fire and Safety Officer on the night shift at a state facility for delinquent boys failed to show that he was terminated because of his Caucasian race. He did state possibly meritorious claims for violations of his rights under the Family and Medical Leave Act (FMLA), however, as well as for retaliation against him for exercising his rights under the FMLA. He intended to visit his mother when his shift ended because he had been informed that she was not likely to survive the night.

When his replacement called in sick, his supervisor allegedly ordered him to remain at work under threat of being fired, even though a co-worker voluntarily stated that they would take over. The appeals court reasoned that not allowing the officer to go be with his dying mother may have violated his rights under the FMLA even though his sister was available to care for her. Under current regulations covering leave requests, an employee need not be the only family member available to care for a sick individual to qualify for leave.

Leave to care for a family member can be intermittent. Additionally, it is useful to note that in some instances either state statutes or negotiated benefits contained in collective bargaining contracts may extend the extent of leave available. Illustrating this, in [\*Holder v. IL Dep't of Corrs.\*](#), #12-1456, 751 F.3d 486 (7th Cir. 2014), an Illinois correctional officer's wife suffered from mental health problems relating to opiate dependency. He

submitted a Family and Medical Leave Act (FMLA) form seeking leave to take off work intermittently or to work less than a full schedule to care for her, based on recommendations from his wife's psychiatrist, who believed that the need for the leave would continue for an "unknown" period of time.

The leave request was approved, and no further medical documentation was asked for, and the employer paid its share of his health insurance costs. After 130 days of absence were recorded, he was told that his FMLA leave had expired, but that he could take up to a year of unpaid leave under a state program, the Illinois Family Responsibility Leave program, but that the state would only contribute to his health insurance cost for six months. After he took 29 absences under that program, a request for two more days off was denied by a warden. He was later notified that the state mistakenly continued to pay for his health insurance beyond the time to which he was entitled, and started withholding 25% of his pay until he had refunded \$8,291.83.

He sued the state, claiming interference with FMLA rights. A jury returned a verdict in favor of the state. The trial judge, however, entered a judgment notwithstanding the jury's verdict finding that the plaintiff's FMLA leave should have lasted one additional month, and awarding him, therefore \$1,222.10 for that one month's medical benefits cost, a ruling the appeals court upheld.

### ***Children***

The Family and Medical Leave Act is no respecter of traditional gender roles. A father as well as a mother is entitled to leave to care for their ill son or daughter. In [\*Knussman v. Md. St. Police\*](#), 935 F.Supp. 659 (D.Md.1996), a federal court applied the FMLA to the Maryland state police, after it denied parental leave to a male trooper. The Eleventh Amendment barred Sec. 1983 damages, but not actions under the FMLA, and the plaintiff ultimately won \$40,000 in damages and \$220,000 in attorney's fees and costs for rejection of his leave request to care for a newborn infant.

In this case, management told the Maryland State Police trooper that fathers were not entitled to use accrued sick leave as the "primary care giver" for a child. Maryland law allows a primary care giver to use 30 days of accrued sick leave for a newborn. He sued under the Family Medical Leave Act of 1993. A jury awarded him \$375,000 in compensatory damages.

A federal appeals court reversed in [\*Knussman v. Maryland\*](#), #99-2349, 272 F.3d 625 (4th Cir. 2001), and called the award grossly excessive. This time the recovery was only \$40,000. [\*Knussman v. Maryland\*](#), #95-1255, 2005 U.S. Dist. Lexis 4907 (D. Md.). The

state had 11th Amendment immunity for the damage claim -- which is against the agency's then personnel manager in his personal capacity. The state was, however, liable for attorney's fees and costs.

### ***Abuse of requested leave***

The protection under the statute for leave to care for a sick family member does not protect an employee against discipline up to termination for abusing that right by utilizing leave to carry out prohibited activities. In [\*Pharakhone v. Nissan\*](#), #01-5955, 324 F.3d 405 (6th Cir. 2003), the court held that an employer could fire a worker who took FMLA leave to care for his wife and newborn child, and was actually managing his wife's restaurant. The employer had a rule prohibiting "unauthorized work for personal gain" while on leave.

But see *City of Warrensville Heights and Ohio PBA*, 126 LA (BNA) 1313, FMCS Case #09/54968 (Lalka, 2009), in which an arbitrator found that management unfairly denied an officer the right to work secondary employment while he was on FMLA leave due to the birth of a child. In that instance, the city had no policy against moonlighting while taking family leave.

### **❖ Military Exigency or Caregiver Leave**

The latest major expansion of the Family and Medical Leave Act added new protections for the family members of military service personnel. It consists of two categories. The first is *military exigency leave*. Under it, family members are allowed unpaid leave to take time away from work to provide for the exigencies that arise out of a military deployment. Such leave is limited, like other FMLA leave for medical care or care of a family member, to 12 weeks during a 12-month period. It only is triggered when the deployed military service member is a spouse, child, or parent of the employee. It covers deployment of members of the National Guard or Reserves, as well as regular Armed Forces.

Such exigencies can include the need to attend military events and ceremonies, family briefings, etc., helping to arrange for alternate childcare when the deployment requires a change in prior childcare arrangements, dealing with necessary legal or financial business or arrangements for the deployed service member, or spending time with a deployed service member who is on short term temporary rest and recuperation. In other words, it is only required that the activity be an exigency. It need not involve a serious medical condition.

The second type of leave authorized by the new provisions is military caretaker leave. In addition to the spouse, child, or parent of an employee, if the service member is the “next of kin” of the employee, in other words, the nearest blood relative, leave for this purpose is possible.

Under this provision, leave is granted to care for a military service member who has a serious injury or illness that was incurred in the line of duty on active duty. For this type of leave alone, the FMLA limitation of 12 weeks of unpaid leave is expanded to 26 weeks, so an employer could be without the employee for a full half year.

### ❖ **Suggestions to Consider**

The following are some suggestions to consider when examining how to best address Family and Medical Leave Act issues for law enforcement or correctional personnel.

1. A well-researched written policy is required that takes into account both the federal Family and Medical Leave Act and any state statute that may exist which extends additional leave benefits as well as any impact that a collective bargaining agreement may have on leave policies. Some state statutes, for example, authorize leave for purposes of organ donation or bone marrow donation or the death of a family member who was a service member on active duty. Some state statutes also authorize leave to allow parents to attend their child’s specified school or educational activities, to allow employees to take family members to even routine medical visits, or to address the effects of domestic violence, sexual assault, or stalking.
2. The policy should be well publicized to both rank and file employees and management personnel and include clear and easy to understand forms and procedures for requesting Family and Medical Leave and having it approved or disallowed, together with a clear appeal process. The federal statute provides for [medical certification](#) for serious medical conditions.
3. Given the fact that the problems covered by the Family and Medical Leave Act can happen to any employee and are usually unanticipated, employers should expect that a certain percentage of employees may be on such leave at any given time. Good management requires planning and taking this into account when determining manpower and staffing requirements.
4. Employers should understand that ultimately, the providing of such leave will help in making sure that when necessary employees can take care of their own health and well-being, and those of their family members, including those

serving in the military. Employees who stay at work with untreated serious medical conditions can endanger both themselves and others. An employee who is overly worried that their spouse, child, parent, or family member serving in the military is experiencing a serious health crisis and that care is not being provided is unlikely to be able to focus their full alert attention on the tasks of the job. In the law enforcement and correctional professions, such problems can literally cost lives. The fact that leave under the Family and Medical Leave Act is unpaid makes it far less likely that an employee will opt to take it if it is not actually needed.

## ❖ Resources

The following are some useful resources related to the subject of this article.

- [Department of Labor Family and Medical Leave information pages.](#)
- [Family and Medical Leave Frequently Asked Questions.](#)
- [Family and Medical Leave Act.](#) Wikipedia article.
- [Family and Medical Leave Act](#), 29 U.S.C. Sec. 2601.
- [Family and Medical Leave Act regulations](#), 29 CFR 825.
- [Family, Medical & Personal Leave.](#) AELE Case Summaries.
- Office of Personnel Management (OPM), [Fact Sheet: Family and Medical Leave.](#)
- [Your Rights Under the Family and Medical Leave Act](#) (video).

## ❖ References

- [The New Age of Dept. of Labor FMLA Audits](#), by Jenna Bedsole, visual presentation at the IACP Legal Officers' Section, Chicago, Illinois (October, 2015).
- [Guide to the Family and Medical Leave Act](#), National Partnership for Women & Families (7<sup>th</sup> Edition 2014).
- [Family and Medical Leave Act Amendments](#), by Richard G. Schott, FBI Law Enforcement Bulletin (Jun. 2010).

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## **AELE Monthly Law Journal**

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