



Minnesota Counties Intergovernmental Trust Resource Briefing

November 2011

Employee Leaves

Apart from standard sick and vacation leave, paid time off (PTO) or other discretionary leave an organization may grant, employees may be entitled to many other leaves under state or federal law. Failure to provide the statutorily required leaves may subject the employer to administrative and/or judicial proceedings. The leave laws on their face are not complex; however, managing the multiple leave laws, especially when they overlap, may be. Also as with any benefit, leave may be subject to abuse; therefore, it is important to properly manage employee leaves. This document is intended to provide an overview of some of the most common federal and state leave laws.

Federal Leave Laws

Family Medical Leave Act (FMLA)

Generally under the FMLA, employees are entitled to 12 weeks of unpaid leave (may be taken in one block or under certain situations intermittently) in a 12-month period for certain qualified events.

Employers Subject to FMLA

All local government employers are covered employers under the FMLA regardless of the number of employees. Covered employers must provide all required notices.

Employees Entitled to FMLA

To be eligible for FMLA leave, an employee must:

- Have worked for a covered employer for at least 12 months (does not need to be consecutive); and
- Have worked 1,250 hours in the 12 months immediately preceding the leave;
 - Must be actual hours worked
 - Does not include paid time off such as vacations, sick leave or holidays; and
- Work at a location where at least 50 employees are employed by the employer within 75 miles. This requirement applies whether the employer is public or private.

Calculating the 12-month FMLA Leave Period

The employer has some discretion in determining how the 12-month period is calculated. It may be a calendar year or some other fixed 12-month period, such as fiscal year, first date of employment, the 12-month period measured forward from the first date any employee's leave begins or a "rolling 12-month period." A rolling 12-month period is measured backward from the date an employee uses any FMLA leave.

The employer must designate which method of calculation will be used. It should be included in the employer's personnel handbook. If the employer fails to select a method, the employee may choose the method of calculation.

Qualifying Reasons for FMLA Leave

- Birth of a child;
- Placement of a child for adoption or foster care;
- To care for the employee's spouse, son, daughter or parent with a "serious health condition";
- A "serious health condition" that renders the employee unable to perform the essential functions of his/her job;
- To care for the employee's spouse, son, daughter, parent or next of kin with a serious injury or illness incurred during active duty military service (entitled to up to 26 weeks of leave); or
- Qualifying exigency related to employee's spouse, son, daughter or parent's call to active duty in the military (or has been notified of an impending call to active duty) in support of a contingency operation.

Serious Health Condition

A serious health condition is defined as an "illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider." Treatment is considered "continuing" if there is:

1. A period of incapacity of more than three consecutive, full calendar days plus treatment by a health care provider twice within 30 days of the first day of incapacity (excluding extenuating circumstances), or one treatment by a health care provider with a continuing regimen of treatment;
2. Any period of incapacity related to pregnancy or prenatal care;
3. Any period of incapacity or treatment for a "chronic serious health condition"
 - requires periodic health care visits (at least twice a year) for treatment
 - continues over an extended period of time
 - may be episodic (e.g. asthma, diabetes, epilepsy);
4. A period of incapacity for permanent or long-term conditions for which treatment may not be effective (e.g., severe stroke, Alzheimer's disease, end stages of a terminal disease); or
5. Any period of incapacity to receive multiple treatments (including recovery from those treatments) for restorative surgery; or for a condition which would likely result in an incapacity for more than three consecutive, full calendar days absent medical treatment.

Incapacity means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment or recovery.

Ordinary illnesses such as the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches (other than migraine), routine dental or orthodontia problems and periodontal disease are examples of conditions that do not meet the definition of a serious health condition unless complications arise.

Leave for Birth of a Child

Both a father and a mother are entitled to FMLA leave for the birth of a child. The right to leave extends until 12 months after the date of the child's birth.

Typically, a husband and wife who are employed by the same employer may be limited to one combined 12-week leave entitlement. When the spouses do not use the total 12-week period, the remaining amount of the 12 weeks can be used for another qualifying event. For example, a husband and wife are employed by County X. They have a child and each take six weeks of leave. Wife is diagnosed with cancer and needs to undergo

treatment within the same 12-month eligibility year. She would be entitled to six weeks of FMLA leave. Also a period of disability related to the pregnancy for the wife would be FMLA leave for a serious health condition of the mother and would not be subject to the combined limit. If the child has a serious health condition, the husband and wife both would be entitled to 12 weeks of leave each to care for the child regardless of having the same employer.

Intermittent or reduced schedule leave after the birth of a healthy newborn is permissible if the employer agrees. If the employer permits intermittent leave, the employer may transfer the employee temporarily to a position that better serves the intermittent leave schedule. The employer must comply with all other laws and collective bargaining agreements.

Leave for Adoption of a Child

Eligible employees are entitled to leave for the placement of an adopted or foster child. Employees may take FMLA prior to the actual placement if the absence is required for the placement to proceed, such as travel to another country or meetings with attorneys. The right to leave expires 12 months from the date of placement. A husband and wife who are employed by the same employer may be limited to a combined 12-week period. The husband and wife would each be entitled to 12 weeks of leave if the leave is for the care of a child that has a serious health condition. Intermittent eligibility is available under the same circumstances for the birth of a child.

Leave for Covered Military Member's Family

"Covered military member" means the employee's spouse, son, daughter or parent on active duty or called to active duty status.

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

Covered active duty in the case of a member of a regular component (e.g., not reserve or guard) of the armed forces, means duty during the deployment of the member with the armed forces to a foreign country.

Covered active duty in the case of a member of a reserve component of the armed forces, means duty during the deployment of the member with the armed forces to a foreign country under a call or order to active duty under a provision of law referred to in §101(a)(13)(B) of title 10, United States Code.

Leave is afforded either to care for the covered service member with a serious injury or illness or to deal with exigent circumstance relating to a deployment or call to active duty.

Leave to Care for a Covered Service Member with a Serious Illness or Injury

This care encompasses both physical and psychological care. It includes situations where the employee may be needed to substitute for others who normally care for the family member of the covered service member or to arrange for such care.

An eligible employee who is the spouse, son, daughter, parent or next of kin of a covered military member is entitled to leave to care for that military member who 1) is on the temporary disability retired list, or 2) has a serious injury or illness incurred in the line of duty for which he or she is undergoing medical treatment, recuperation or therapy. An injury or illness is serious if it renders the service member medically unfit to perform the duties of his or her office, grade, rank or rating.

The term “parents” includes biological, adoptive, step, foster or any other individual who stood *in loco parentis* to the covered service member. It does not apply to parents-in-law. Next of kin is the nearest blood relative other than those listed above. The covered service member can designate the next of kin. When no designation is made and multiple family members have the same level of relationship all such members shall be considered the next of kin and may take leave either consecutively or simultaneously.

The employee is entitled to 26 weeks of leave instead of 12 weeks. The single 12 month period starts the day the FMLA leave begins. If the total 26 weeks is not taken, the remaining part of the leave is forfeited. The leave is per service member, per injury. An employee may be eligible for 2 leaves within the same 12 month period.

An eligible employee may take the leave in conjunction with another qualifying leave but not more than 12 weeks is permitted for any of the other reasons for leave. For example, if the employee takes 16 weeks to care for a covered service member, the employee may take 10 weeks of leave to care for a newborn baby. A husband and wife who are employed by the same employer may be limited to a combined total of 26 weeks during the single 12-month period to care for a covered service member with a serious injury or illness.

Leave Due to a Qualifying Exigency

Qualifying exigencies include, but are not limited to the following.

Short notice deployment: Includes where a covered service member is called to duty in support of a contingency operation seven or less calendar days prior to day of deployment. Leave can be used for a period of seven days beginning on the date the covered service member is notified of the qualifying deployment.

Military events and related activities: Includes official ceremonies, programs or events related to the qualifying deployment. It also includes informational or assistance meetings related to the qualifying deployment.

Childcare and school activities: Includes time for arranging child care when the call to active duty requires a change in the current schedule. It also includes providing child care on an urgent immediate need (but not on a routine, regular or everyday basis). Time is also afforded to enroll in or transfer to a new school or day care when enrollment or transfer is necessitated by the call to active duty and for attending meetings with school or day care employees, when the meetings are necessitated by the call to active duty.

“Child” includes biological, adopted, foster, step or legal wards, a child for whom the covered military member stands *in loco parentis* who is either under the age of 19 or 19 or older and incapable of self-care because of a mental or physical disability.

Financial and legal arrangement: Involves making or updating financial or legal arrangements to address the covered military member’s absence, such as power of attorney, living will, etc. It also includes time off to act as the covered military member’s representative to obtain, arrange for or appeal military benefits while the military member is called to active duty and for a period extending 90 days after the duty is completed.

Counseling: Includes counseling for oneself, the military member or a child provided the need for counseling arises from the active duty or call to active duty for the covered military member.

Rest and recuperation: Includes up to five days of leave for each period of rest and recuperation by the covered service member during the period of deployment.

Post-deployment activities: Includes arrival ceremonies, reintegration briefings and events and other official military sponsored ceremonies or programs for a period of 90 days following the covered service member's termination of active duty status.

Additional Activities: Includes other events which arise out of the covered military member's active duty or call to active duty status provided the employee and employer agree that the leave qualifies as an "exigency" and to the time and duration of leave.

FMLA Employer Notification Requirements

In general, the employer must post a notice relative to FMLA rights. The notice must be posted even if the employer does not have any FMLA eligible employees. If the employee does have eligible employees, it must provide notice of the rights in the employee handbook. Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer shall provide the general notice in a language in which the employees are literate.

Eligibility Notice

Upon acquiring knowledge that the employee's leave may be FMLA eligible, the employer must notify the employee of his or her eligibility to take FMLA leave within five business days, absent extenuating circumstance.

The Department of Labor requires certain information be provided in the notice. MCIT recommends using the DOL model notices to ensure that the entity complies with the notice requirements. The DOL's Notice of Eligibility and Rights & Responsibilities (Family and Medical Leave Act) is available at <http://www.dol.gov/whd/forms/WH-381.pdf>.

Key items that must be included in the notice:

- Leave may be designated and counted against FMLA leave;
- Documents that the employee must furnish to substantiate FMLA leave;
- The employee's right to substitute paid leave;
- Requirements for employee to make benefit premium payments;
- Employee's status as a "key employee" and the potential consequences; and
- Employee's right to maintenance of benefits and reinstatement rights.

The notice may be accompanied by any necessary certification forms.

Designation Notice

Within five days of receiving enough information to determine if the leave is FMLA eligible, the employer must send a notice to the employee designating the leave. The designation notice must be in writing. When a fitness for duty certification is required prior to allowing the employee to return to work, the employer must include this in the designation notice and include a list of essential functions of the employee's position. When the employer's handbook or other written documents clearly provide that fitness-for duty certifications will be required in certain circumstances, the employer may verbally provide notice that such forms will be required. MCIT recommends that such information be provided in the written designation notice.

Fitness for duty: The employer may seek certification only with regard to the particular underlying health condition necessitating FMLA leave. The employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job.

The Department of Labor requires certain information be provided in the notice. MCIT recommends using the Department of Labor model notices to ensure that the entity complies with the notice requirements. Members can access the document here: <http://www.dol.gov/whd/forms/wh-382.pdf>.

FMLA Employee Notification Requirements

The employee must give notice within 30 days of the leave if the leave is foreseeable, e.g. pregnancy. If the 30 days notice is impracticable, e.g., surgery scheduled in two weeks, notice should be given as soon as practicable. If the employee fails to provide the 30-day notice and it was foreseeable, the employee shall explain the reason such notice was not practicable.

When the leave is unforeseeable, the employee should give notice as soon as practicable. It generally should be practicable for the employee to provide notice within the time prescribed by the employer's usual and customary notice requirements. As explained below, when an employee fails to comply with the employer's usual notice and procedural requirements, FMLA protected leave may be delayed or denied. However, if an employee requires emergency medical treatment, he or she would not be required to follow the call-in procedure until his or her condition is stabilized and he or she has access to and is able to use a phone. In this situation, following the employer's internal rules and procedures may not be required.

In both circumstances, the employee's notice may be verbal. It should provide enough information to make the employer aware that the leave qualifies for FMLA and the timing and duration of the leave. The employee does not have to assert rights expressly under the FMLA or even mention the FMLA. However, the employee must adequately explain the reasons for the leave or the leave may be denied. Calling in sick without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act.

Employee's Failure to Provide Notice

Prior to leave being delayed or denied due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements. Actual notice is satisfied by the employer properly posting the required notice at the worksite where the employee is employed and placing the required notice in either an employee handbook or via employee distribution. MCIT recommends having an employee sign an acknowledgement that the handbook or policy was received and reviewed.

When the need for FMLA leave is foreseeable at least 30 days in advance and timely notice is not given, the employer may delay the leave for 30 days from the time notice was given. However, the leave must be *clearly* foreseeable. When the need for foreseeable leave is less than 30 days and the employee fails to give notice as soon as practicable under the particular case, the extent to which leave may be delayed depends on the facts of the particular situation.

An employer may waive the employee's FMLA notice obligations. However, the decision to waive notice may not be made in a discriminatory manner. For example, if the employer routinely waives the regular call-in notice procedures for non-FMLA type leave, the procedures may not be applied only in an FMLA situation.

If an employer does not designate FMLA leave appropriately, the employer may retroactively designate the leave as long as such designation does not cause harm or cause injury to the employee.

When the leave is designated as FMLA, members should use the DOL Designation Notice (Family and Medical Leave Act) form available at <http://www.dol.gov/whd/forms/WH-382.pdf>.

Certification

An employer may request medical certification to support the need for FMLA leave. Notice must be given each time a certification is required. The employer should request certification:

- At the time the employee gives notice of the need for leave.
- Within five business days thereafter.
- In the case of unforeseen leave, within five business days after the leave commences.

Concurrent with Workers Compensation

If an employee is on FMLA leave running concurrent with a workers' compensation claim, the employer can consider information authorized under the workers' compensation statute. Information received under those provisions may be considered in determining an employee's entitlement to FMLA leave.

Concurrent with Paid Leave Policy/Disability Plan

When FMLA leave arises at the same time as a request under another paid leave policy or disability plan, the employer may request additional information in accordance with the paid leave policy or disability plan that requires greater information to qualify for payment or benefits. The employer must inform the employee that the additional information only needs to be provided in connection with receipt of such additional payments or benefits. The information may be considered in determining the employee's entitlement to FMLA-protected leave. The employee's failure to provide such information may not affect FMLA determination.

Medical Release

An employee may choose to provide a medical release allowing the employer to have direct contact with the employee's medical provider. The employer may not require the employee to execute such a release, but it is still the employee's responsibility to provide sufficient information to determine whether the leave is FMLA eligible.

Authentication and Clarification of Medical Certification

When an employee submits a complete and sufficient medical certification signed by the health care provider, the employer may not request additional medical information.

The employer may for purposes of clarification and authentication of the medical certification contact the medical provider. Contact may only be made by a:

- Health care professional,
- Leave administrator or
- Management official.

Contact may *not* be made by the employee's direct supervisor.

Authentication means having the medical provider verify that the information contained in the form was completed by the medical provider. Clarification means contacting the health care provider to understand the handwriting or to understand the meaning of a response. Employers may not ask health care providers for additional information beyond that required by the certification form.

The requirements of HIPPA apply to the clarification. Therefore, employee consent must be obtained prior to contacting the medical professional. If an employee chooses not to provide the employer with authorization allowing the employer to clarify the certification with the health care provider and does not otherwise clarify the certification, the employer may deny the taking of FMLA leave if the certification is unclear.

Second Opinions

An employer who has reason to doubt the validity of the medical certification may order a second opinion at the employer's expense. The employee is entitled to FMLA benefits pending the results of the second (or third) medical opinion. The employer may select the medical provider to provide the second opinion. If the first and second opinions differ, the employer may require the employee to obtain a certification from a third health care provider at the employer's expense. The third opinion is final and binding, and must be approved jointly by the employer and employee. If either party does not negotiate in good faith to find a mutually agreeable health care provider, the other party's medical certification will be binding.

The employee is entitled to copies of the second and third opinions. The employee is entitled to reimbursement for travel expenses to obtain such medical opinion if traveling outside normal commuting distances is required.

Recertifications

Generally an employer may not request a recertification more than once every 30 days and only in connection with an absence by the employee. If the initial period of certification states a minimum duration (e.g., 40 days), the employer may only request another certification after expiration of that period (e.g., 40 days). However, an employer may request recertification once every six months even if medical certification articulates a duration longer than that (e.g., need for a reduced schedule for one year).

A request for recertification may be made in periods less than 30 days if:

- The employee requests an extension of leave;
- The circumstances described by the previous medical certification have changed significantly; or
- The employer receives information that casts doubt upon the employee's stated reason for the absence.

Certification for Leave Taken Because of a Qualified Exigency (Military Deployment)

The first time such leave is requested, the employer may request the military member's active duty order or other military documentation. The document only needs to be provided once.

An employer may also require a certification from the employee that includes:

- A signed statement or description outlining the appropriate facts regarding the qualifying exigency; including, but not limited to, a copy of a meeting announcement for information briefings sponsored by the military, a document confirming an appointment with a counselor or school official, or a copy of a bill of the service for the handling of legal or financial affairs;
- Approximate date leave will commence, beginning and end dates if applicable;
- An estimate of the frequency and duration of the qualifying exigency if requested leave is for intermittent and reduced schedule; or
- Contact information for a third person and a brief description of the purpose of the meetings if leave is for a meeting with a third person.

Verification

If the leave is for a meeting with a third party, contact may be made with the third party to verify the time and nature of the meeting. The employee's permission is not required to obtain verification, but no additional information may be requested from the third party.

An employer also may contact the appropriate unit of the Department of Defense to request verification that a covered military member is on active duty or has been called to active duty status. Again no additional information may be requested. The employee's permission is not required.

Certification for Leave Taken to Care for a Covered Servicemember (Military Caregiver)

Second and third opinions are not permitted. Recertifications are also not permitted. An employer requesting certification must allow invitational travel orders (ITOs) or invitational travel authorizations (ITAs) in lieu of the Optional Department of Labor form or the employer's own certification form. Such forms are sufficient whether or not the employee is named in the orders. However, an employer may require an employee to provide confirmation of the covered family relationship to the service member. Also an employer may seek authentication or clarification of the ITA/ITO.

If the employee's need for leave exceeds the time authorized in the ITO/ITA, the employer may require the completion of a medical certification. See DOL form at this Web address: <http://www.dol.gov/whd/forms/wh-385.pdf>.

Intermittent Leave

Intermittent leave is simply FMLA leave but used in separate short blocks of time due to a single qualifying reason.

The medical need must be one that can be best accommodated through an intermittent or reduced leave schedule. The employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations.

During the period of intermittent leave, the employer may require the employee to transfer temporarily to an available alternative position with equivalent pay and benefits for which the employee is qualified and better suits the intermittent leave schedule. The transfer cannot be done to discourage the employee from taking leave or otherwise place a hardship on the employee. For example, a day shift employee may not be reassigned to the night shift. The employer should ensure that the transfer complies with the Americans with Disabilities Act, collective bargaining agreements and other applicable laws.

After the leave has ended, the employee must be reinstated to the same or equivalent position. An employee may not be required to take more leave than necessary to address the circumstance that precipitated the need.

Calculating Leave Used

The employer must account for the leave using an increment no greater than the shortest period that the employer uses to account for use of other forms of leave (assuming it is not greater than one hour). FMLA leave entitlement may not be reduced to greater than the amount of leave actually taken. The actual workweek is the basis for the entitlement.

Examples:

A full-time employee who typically works eight-hour days works four hours a day under a reduced leave schedule. The employee would use 20 hours per week of FMLA leave.

A part-time employee who works 30 hours a week works 20 hours a week under a reduced leave schedule. The employee would use 10 hours a week of FMLA leave.

An employer may convert fractions to its hourly equivalent so long as the conversion equitably reflects the employee's total normally scheduled hours.

Substitution of Paid Leave

An employer may, as a policy or practice, require that an employee use any accrued paid time off (i.e., vacation, sick or PTO) in conjunction with the FMLA leave. The employer has to inform the employee of its practice prior to any request for FMLA leave being made. When the employer does not require such use, the employee may elect to use his or her paid leave. To be entitled to the pay, the employee must comply with any additional requirements of the employer's paid leave policy.

If the employer does not require and the employee does not elect to use paid leave, the employee will be entitled to use all paid leave that is earned or accrued under the terms of the employer's plan upon reinstatement.

Employee's Reinstatement Rights

An employee is entitled to be returned to the same position he or she held when leave commenced or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.

Equivalent Position

This is a position that is "virtually identical" to the position held immediately prior to leave in terms of pay, benefits and working conditions. Duties, responsibilities, skill and authority must also be the same or substantially the same. If an employee is no longer qualified for the position (e.g., inability to attend a necessary course), he or she must be given a reasonable opportunity to fulfill those conditions upon return to work.

Equivalent Pay

An employee is entitled to any unconditional pay increases that may have occurred during the FMLA leave period (e.g., cost of living increases). Other pay increases (e.g., based on seniority, length of service) may be made consistent with the employer's policy or practice relative to non-FMLA leave. Employee benefits must also be the same as the employee had prior to leave.

Equal Terms and Conditions of Employment

The employee must be reinstated to the same or a geographically proximate worksite. The employee is ordinarily entitled to return to the same shift or hours a week worked and must have the same or an equivalent opportunity for bonuses, profit sharing, and other similar discretionary and nondiscretionary payment. It does not extend to *de minimis*, intangible or immeasurable aspects of the job.

Employer's Decisions to Deny Leave or Reinstatement Employees

Although the circumstances when an employer may lawfully refuse to provide leave or reinstate an eligible employee are limited, they do exist.

Failure to Provide Certification

If the employee fails to provide timely medical certification as verification of a serious health condition, the employer may delay continuation of leave until the appropriate certification is provided. If the employee never produces the certification, the leave will not qualify as FMLA leave.

Failure to Provide Return to Work Certification

If the employer properly requires a return to work certification and the employee fails to provide the certification, the employer may delay the employee's return to work until the certification is submitted.

Termination or Lay Off for Reasons Unrelated to FMLA Leave

Employees on FMLA leave have no greater reinstatement rights or other benefits and conditions of employment than if they had been continuously employed during the leave. To deny restoration to employment, an employer must show that when an employee requests reinstatement, that the employee would not otherwise have been employed if leave had not been taken, e.g., employee would have been subject to lay off. If later recalled or otherwise re-employed, an eligible employee is immediately entitled to further FMLA leave for a qualifying reason.

Employee Does Not Intend to Return to Work

If an employee advises the employer that he or she does not intend to return to work, the employment relationship is considered terminated and rights to reinstatement, continued leave and health benefits cease. It is advisable that employers secure a written confirmation of the employee's intent to terminate employment. An employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. Such policy may not be discriminatory and must take all relevant facts and circumstances into consideration.

Employee Was Hired for a Specific Term or Project

If an employee was hired for a specific term or only to perform work on a specific project, the employer has no obligation to restore the employee if the employment term or project is over and the employer would not otherwise have continued to employ the employee. On the other hand, if an employee were hired to perform work on a contract and the contract term concludes, the successor contractor may be required to restore the employee if it is a successor employer.

Employee Is a "Key Employee"

Job restoration to a "key employee" may not be required if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer. A key employee is a salaried employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee's worksite.

The determination of whether a salaried employee is among the highest paid 10 percent must be made at the time the employee requests the leave. The employee must be told the potential consequences regarding reinstatement. To deny restoration, restoration of the employee to employment must cause "substantial and grievous economic injury" to the operations of the employer, not that the absence of the employee will cause such substantial and grievous injury.

Violation of FMLA Rights by Employer

If the employer has been found to have violated an employee's FMLA rights, the employee is entitled to reimbursement for any monetary loss incurred, equitable relief as appropriate, interest, attorneys' fees, expert witness fees and court costs. Liquidated damages may also be awarded. *See* 29 U.S.C. 2617.

Americans with Disabilities Act (ADA)

The ADA protects qualified individuals with a disability against employment discrimination. A government entity that employs 15 or more employees for each working day each of 20 or more calendar weeks in the current or preceding calendar year is subject to the ADA.

The term “disability” includes:

- Physical or mental impairments that substantially limit one or more major life activities;
- A record of such an impairment; or
- Being regarded as having such an impairment.

A qualified individual with a disability can perform the essential functions of the job, with or without reasonable accommodation. The definition of “disability” has recently been expanded and if a question arises, the member should contact legal counsel or the human resources department regarding whether the employee is disabled within the meaning of the law.

Covered employers must reasonably accommodate qualified disabled employees, other than employees covered only under the “regarded as” prong, to allow performance of the position’s essential functions. One example of reasonable accommodation could include an unpaid leave and or a part-time or modified work schedule.

The ADA does not specify how much time off is a reasonable accommodation. The EEOC takes the position that ADA requires leave beyond the 12 weeks of FMLA leave as a reasonable accommodation. See EEOC Guidance on Reasonable Accommodation Under the ADA. For non-FMLA eligible employees, how much time is a reasonable accommodation must be considered on a case-by-case basis.

USERRA—Federal Military Leave/Reinstatement

The Uniformed Services Employment and Reemployment Rights Act (USERRA) prohibits discrimination and retaliation based on a person’s military status. It applies to a person who:

- Is a past or present member of the uniformed service;
- Has applied for membership in the uniformed service; or
- Is obligated to serve in the uniformed service.

Uniformed services are defined as the Army, Navy, Marine Corps, Air Force, Coast Guard, each reserve branch, Commissioned Corps of the Public Health Services, Army and Air National Guard when on active duty, inactive duty, training or on full-time National Guard duty and any other group designated by the president during a war or national emergency.

The law prohibits an employer from denying the following based on military status:

- Initial employment,
- Re-employment,
- Retention in employment,
- Promotion or
- Any benefit of employment

An employer is also required to notify employees of their rights under USERRA. The notice must explain what rights and protections employees have under the act including:

- Right to re-employment,
- Freedom from discrimination and retaliation, and
- Health and pension benefit protections.

The employer can provide this notice to individual employees who are covered by USERRA, or it can post a notice. The U.S. Department of Labor has prepared a poster that employers can use to meet this notice requirement. It is available at http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf.

The length of the military leave governs how long the employee has the right to reinstatement.

Leave up to 30 days:

- To claim re-employment rights, the employee must report for work at the next regularly scheduled shift on the day after release. The time must allow for safe transportation from the place of service to the employee's residence and an eight hour rest period.
- Re-employment position is the same as for leaves less than 90 days (see below).

Leave more than 30 days, but less than 181 days:

- An application for re-employment (written or verbal) must be made to the employer not later than 14 days after completing service.
- Employer is to provide "prompt re-employment," meaning as soon as practicable under the circumstances. Absent unusual circumstances, re-employment must occur within two weeks.
- Employee is entitled to reinstatement to the position that he or she would have had if not for the military leave (escalator principle):
 - Pay,
 - Benefits,
 - Seniority and
 - Nonseniority rights and benefits generally provided by the employer to other employees with similar seniority, status and pay that are on similar nonmilitary furlough or leave.
- Employer must make reasonable efforts to help the employee become qualified to perform the duties of the position.
- If the leave *was more than 90 days*, the employee may be eligible also, in the alternative, for an escalator position of like seniority, status and pay, the duties of which the person is qualified to perform.
- If after reasonable efforts (including additional training) by the employer, the employee does not qualify for the appropriate escalator re-employment position(s), the employee must then be employed in the position held on the date of entering military service.
- If after reasonable efforts by the employer, the employee cannot qualify for any of the above (other than due to disability incurred in or aggravated during military service), the employee must be employed in any other position that is the nearest approximation to a position above with full seniority.

Leave more than 181 days:

- An application for re-employment must be submitted not later than 90 days after completing service.
- Employer is to provide "prompt re-employment," meaning as soon as practicable under the circumstances. Absent unusual circumstances, re-employment must occur within two weeks.
- Employee is entitled to reinstatement to the job position that he or she would have had if not for the military leave (escalator principle):
 - Pay,
 - Benefits,
 - Seniority and
 - Nonseniority rights and benefits generally provided by the employer to other employees with similar seniority, status and day that are on similar nonmilitary furlough or leave.

- Employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.
- In the alternative, the employee may be eligible for an escalator position of like seniority, status and pay, the duties of which the person is qualified to perform.
- If after reasonable efforts (including additional training) by the employer, the employee does not qualify for the appropriate re-employment escalator position(s), the employee must then be employed in the position held on the date of entering military service.
- If after reasonable efforts by the employer, the employee cannot qualify for any of the above (other than due to disability incurred in or aggravated during military service), the employee must then be employed in any other position that is the nearest approximation to a position above with full seniority.

Disability Incurred or Aggravated During Military Service

If the employee has been physically disabled, the employer must make a reasonable accommodation so that the employee may perform the duties of one of these positions (in order of priority):

- The escalator position;
- If the person is not qualified for the above by reason of the disability, a position that is the equivalent in seniority, status and pay to the escalator position, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by employer;
- If the person is not qualified for the above by reason of the disability, a position that is the nearest approximate to the equivalent position, consistent with the circumstances of the employee’s case, in terms of seniority, status and pay.

Deadlines for Re-employment Applications Extended Due to Military Injury

If an employee is hospitalized for or convalescing from an illness or injury incurred in or aggravated during the performance of service, the deadlines are extended for up to two years.

Re-employment May Not Be Required If:

- The employee would be on lay-off status, if not on military leave;
- The employer’s circumstances have changed so much as to make employment impossible or unreasonable;
- Any accommodation, training or effort required would impose an undue hardship on the employer; or
- Employment was for a brief, non-recurrent period and no reasonable expectation that employment will continue indefinitely or for a significant period.

For a more detailed discussion of military leaves, please see MCIT’s Resource Briefing “Veteran’s Preference Act and Military Leaves.”

State Statutory Leaves of Absences

Minnesota Human Rights Act (MHRA) (Minn. Stat. Ch.363A)

Like its federal counterpart the ADA, the MHRA protects qualified individuals with a disability against employment discrimination. Employers with one or more employees are covered by the nondiscrimination provisions of the statute. Employers with 15 or more part-time or full-time employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year are subject to the “reasonable accommodation” provisions of the statute.

The MHRA protects qualified disabled persons against employment discrimination. The term “disability” includes:

- Physical, sensory, or mental impairments that materially limit one or more major life activities;
- A record of such impairment; or
- Being regarded as having such an impairment.

A qualified disabled person can perform the essential functions of the job, with or without reasonable accommodation.

As with the ADA, one example of reasonable accommodation could include an unpaid leave and or part-time or modified work schedule. A reasonable accommodation is not required if it would impose undue hardship on the employer, such as significant difficulty or expense. The MHRA also provides, unlike the ADA, that an employer must offer reasonable accommodation to pregnant employees.

The MHRA does not specify how much time off is necessary to be a reasonable accommodation. The Minnesota Department of Human Rights (state agency charged with enforcement of the MHRA) generally follows federal law and EEOC interpretations; therefore, the ADA and the MHRA have a similar analysis. Twelve weeks of required FMLA leave is the bare minimum amount of leave that an employer must grant to accommodate a disability.

Birth or Adoption Leave (Minn. Stat. § 181.941)

An employer must grant an unpaid leave to an employee who is a natural or adoptive parent in conjunction with the birth or adoption of a child. Unless agreed to by the employer, the leave may not exceed six weeks.

- The leave may begin not more than six weeks after the birth or adoption (except where the child needs to stay in the hospital longer than the mother. The leave must begin within 6 weeks from the day the child leaves the hospital).
- Employer may not retaliate against an employee exercising the rights under this leave.
- The employee must have rights to continued insurance; however, the employer need not pay the costs of such insurance while the employee is on leave.

Sick or Injured Child Care Leave (Minn. Stat. §181.9413)

An employee may use personal sick leave benefits for absence due to an illness or injury to the employee’s child on the same terms the employee is able to use sick leave benefits for the employee’s own illness or injury. “Personal sick leave benefits” does not include short-term or long-term disability or other salary continuation benefits.

School Conference and Activities Leave (Minn. Stat. §181.942)

An employer must grant an employee up to a total of 16 hours within any 12-month period to attend school conferences or school-related activities for the employee’s child (includes foster child) if:

- The conferences or school related activities cannot be schedule during non-work hours; and
- The employee provides reasonable prior notice of the leave and makes a reasonable effort to schedule the leave so not to unduly disrupt the operations of the employer.

The leave does not have to be paid. The employee may substitute paid vacation or other appropriate paid leave for any part of the leave under this section.

For the three preceding leaves, “employee” means a person who performs services for hire for an employer at least 12 consecutive months immediately preceding the request and works an average number of hours per week equal to one-half the full-time equivalent position.

Leave for Bone Marrow Donation (Minn. Stat. §181.945)

An employer (defined to include all government entities) must grant a paid leave of absence to an employee who seeks to undergo a medical procedure to donate bone marrow.

- The leave may not exceed 40 hours unless agreed to by the employer.
- The employer may require verification by a physician of the purpose and length of leave requested by the employee.
- If the employee does not qualify as a bone marrow donor, the paid leave of absence granted prior to that medical determination is not forfeited.

An employer may not retaliate against an employee for seeking such leave. An employer may provide for additional leave and any other leave rights the employee may have (e.g., FMLA) are not affected by this leave.

“Employee” is defined as a person who performs services for hire for an employer, for an average of 20 or more hours per week and includes all individuals employed at any site owned or operated by an employer. Employee does not include an independent contractor.

Leave for Organ Donation (Minn. Stat. § 181.9456)

An employee who seeks to undergo a medical procedure to donate an organ or partial organ to another person, must be given paid leave.

- The leave may not exceed 40 hours unless agreed to by the employer.
- The employer may require verification by a physician of the purpose and length of leave requested by the employee.
- If the employee does not qualify as a donor, the paid leave of absence granted prior to that medical determination is not forfeited.

“Employee” is defined as a person who performs services for hire for an employer, for an average of 20 or more hours per week and includes all individuals employed at any site owned or operated by an employer. Employee does not include an independent contractor.

Political Party Officers/Delegates to Party Conventions (Minn. Stat. §202A.135)

Upon 10 days written notice, the employee may be absent from work to:

- Attend any meeting of the state central committee or executive committee of a major political party if the employee is a member of the committee; or
- Attend any convention of major political party delegates (including meetings of official convention committees) if the employee is a delegate or alternate delegate to that convention.

An employee who gives proper notice as provided in this section shall suffer no penalty or deduction from salary or wages on account of absence other than a deduction in salary or wages for the actual time of absence from employment.

Failure to grant this leave could be a misdemeanor.

Attendance at Major Political Party Precinct (Minn. Stat. § 202A.19)

Every employee who is entitled to attend a major political party precinct caucus is entitled to be absent from work for the purpose of attending the caucus during the time for which the caucus is scheduled without penalty of deduction from salary or wages on account of the absence other than a deduction in salary for the time of absence from employment. The employee must provide 10 days' written notice to the employer stating the need for the leave.

Legislative/Elected Office (Minn. Stat. §3.088)

Any appointed officer or employee of a political subdivision who serves as a legislator or a full-time city or county officer in Minnesota is entitled to a leave of absence from public employment without pay when on the business of the office with the right of reinstatement.

Reinstatement must be to the actual position or one of like seniority, status and pay if it is available, at the same salary that would have been received if the leave had not been taken upon the following conditions:

- The position has not been abolished or that its term, if limited, has not expired;
- The legislator makes a written application for reinstatement to the appointing authority within 30 days after the last legislative day in a calendar year or in the case of an elected city or county official, within 30 days after the expiration of the elected term; and
- The request for reinstatement is made not later than 10 years after granting the leave.

State Military Leaves

Authorized Paid Leave (Minn. Stat. §192.26)

Employees who are members of the National Guard or the Officers' Reserve Corps, the enlisted reserve corps, the Naval Reserve, the Marine Corps reserve, or any other reserve component of the military or naval forces have the right to a leave of absence *without loss of pay*, seniority, status, efficiency rating, vacation, sick leave or other benefits for all the time when engaged with such organization or component in training, or active service ordered up to 15 days a year.

To be eligible for the paid leave, the employee must return to the public position immediately after being relieved, unless:

- The employee is prevented from returning due to a physical or mental disability, or other cause not due to the officer's or employee's fault; or
- The employee is required by proper authority to continue in such military or naval service beyond the 15 days.

Authorized Pay Differential (Minn. Stat. §471.975)

A public entity may pay a salary differential to an employee who is a member of the National Guard or Reserve who is ordered to active military service.

- The qualifying criteria for an employee are:
 - Payment may be made only to a person whose base active military pay is less than the salary the employee would have received as an employee of the public subdivision;
 - The difference in pay includes any adjustments the member would have received if not on a leave of absence; and
 - Payment must not extend four (4) years from the date that the employee reported for active service.
- An employee has the option to use accrued vacation during the leave, but may not be required to use it.

Leave of Absence Benefit Rights (Minn. Stat. §192.261)

Employees who engage in active service in the time of war or other emergency declared by the proper authority and for which leave is not otherwise allowed by law are entitled to a leave of absence. The leave of absence may not extend beyond four years plus any additional time such individual may be legally required to serve. If the benefits under this state statute are less than those granted by USERRA, the USERRA benefits control.

Like the veteran's rights under USERRA, upon re-employment, the employee is entitled to the equivalent "escalator" position.

- Employee also has the right to:
 - accrued sick leave;
 - Accrued vacation time;
 - Other benefits, such as seniority, that the officer or employee would have had had the employee actually been employed during the leave; and
 - The accrual of leave time must be without regard to regulations limiting the number of days that may be accumulated.
- Reinstatement is not required if:
 - The position has been abolished;
 - The employee is not physically or mentally able to perform the duties of the position;
 - The employee was dishonorably discharged; or
 - The employee fails to make a timely application for re-employment.

Any person who is reinstated under this provision shall not be discharged from the position unless for cause, after notice and hearing, within one year after reinstatement.¹

Authorized Leave for Training (Minn. Stat. § 192.261)

An employee who is on leave for an initial period of active duty for training of not less than three consecutive months shall be entitled to reinstatement upon re-employment within 31 days after that employee's:

- Release from active duty for training after satisfactory service; or
- Discharge from a hospitalization stemming from active duty or training.

Any person who is reinstated under this provision shall not be discharged from the position unless for cause within six months after reinstatement.

The employee shall be entitled to all re-employment rights and benefits.

For any other training for active duty or inactive duty, the employee is entitled to reinstatement with all re-employment rights and benefits. He or she must report for work on the next regularly scheduled work period after release from training (including any necessary travel time).

Retirement and Pension Rights (Minn. Stat. § 192.262)

Employees have a right to continued employment and retirement benefits, including increases, as if they were not on leave if payment of contributions or assessments continues to occur. If an employee elects to purchase PERA service credit, the employer is obligated to provide the employer contribution.

¹ Public sector employers may only discharge veterans for cause pursuant to the Minnesota Veterans Preference Act.

Employment Leave for Family Members of an Injured or Killed Soldier² (Minn. Stat. § 181.947)

Public employers must grant an unpaid leave of absence of up to 10 days to an employee whose immediate family member is injured or killed while serving anywhere in active military service.

- “Immediate family” is defined as a deceased service member’s parent, child, grandparent, sibling or spouse.
- Active service is defined broadly to include both federal and state active military for any purpose, including training.
- Independent contractors are included in the definition of “employee.”
- The employee must give the employer as much notice as is practicable before taking leave.
- The employer may reduce the unpaid leave by any period of paid leave provided for the employee.
- The employer may provide leave benefits in addition to those provided in this section.

Employment Leave for Family Members to Attend Military Ceremonies (Minn. Stat. 181.948)

Employers must grant an unpaid leave of absence to an employee whose immediate family member has been ordered into active service in support of a war or other national emergency.

- Leave does not have to be granted if it unduly disrupts the operations of the employer.
- The employer may limit the amount of leave to the actual time necessary to attend a send-off or homecoming ceremony not to exceed one day’s duration in any calendar year.
- Independent contractor is *not* included in the definition of “employee.”

Employer must not discharge from employment, take adverse employment action against or otherwise prevent an employee from attending the employee’s spouse’s, parent’s or child’s:

- Departure and return ceremonies for deploying or returning military personnel or units;
- Family training or readiness events sponsored or conducted by the military; and
- Events held as part of official military reintegration program and to which the employee is invited or otherwise called upon to attend by proper military authorities.

The employee must provide reasonable notice. The employee’s right to leave may not exceed two consecutive days or six days in a calendar year. The employee is allowed to but may not be compelled to use accumulated but unused vacation.

Civil Air Patrol (Minn. Stat. § 181.946)

Unless the leave would unduly disrupt the operations of the employer, an employer shall grant a leave of absence without pay to an employee for time spent rendering service as a member of the civil air patrol on the request and under the authority of the state or its political subdivisions.

- An employee is one who works an average of 20 hours per week for an employer.
- An employee does not include an independent contractor

Athletic Leaves of Absence (Minn. Stat. §15.62)

A “public employee” who qualifies as a member of a United States team for athletic competition on the world championship, Pan American or Olympic team in a sport sanctioned by the International Olympic Committee

² For an injured family who is a service member, an employer may also have an obligation to grant leave to the employee under the provisions of the Family Medical Leave Act.

may be granted a leave of absence without loss of pay or other benefits or right for the purpose of preparing for and engaging in the competition.

- The paid leave shall not exceed the period of the official training camp and competition combined or 90 calendar days whatever is less.
- The employer is responsible for the actual cost of employing a substitute.

Conclusion

The application of benefit laws can be complex. There may be situations where more than one leave is applicable and may run concurrently. MCIT recommends that members contact their human resources or legal counsel when members think a certain leave law may apply. They should inquire about the application and administration of the leave laws at issue.