

care for a parent, the spouses would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a healthy, newly placed child, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition.

(4) An eligible employee is entitled to FMLA leave in order to care for an adopted or foster child with a serious health condition if the requirements of §§ 825.113 through 825.115 and 825.122(d) are met. Thus, spouses may each take 12 weeks of FMLA leave if needed to care for an adopted or foster child with a serious health condition, even if both are employed by the same employer, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

(b) *Use of intermittent and reduced schedule leave.* An eligible employee may use intermittent or reduced schedule leave after the placement of a healthy child for adoption or foster care only if the employer agrees. Thus, for example, the employer and employee may agree to a part-time work schedule after the placement for bonding purposes. If the employer agrees to permit intermittent or reduced schedule leave for the placement for adoption or foster care, the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employer's agreement is not required for intermittent leave required by the serious health condition of the adopted or foster child. See §§ 825.202–825.205 for general rules governing the use of

intermittent and reduced schedule leave. See § 825.120 for general rules governing leave for pregnancy and birth of a child. See § 825.601 for special rules applicable to instructional employees of schools. See § 825.802 for special rules applicable to airline flight crew employees.

[78 FR 8902, Feb. 6, 2013, as amended at 80 FR 10000, Feb. 25, 2015]

**§ 825.122 Definitions of covered servicemember, spouse, parent, son or daughter, next of kin of a covered servicemember, adoption, foster care, son or daughter on covered active duty or call to covered active duty status, son or daughter of a covered servicemember, and parent of a covered servicemember.**

(a) Covered servicemember means: (1) 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 injury or illness; or

(2) A covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness. *Covered veteran* means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. See § 825.127(b)(2).

(b) *Spouse, as defined in the statute,* 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.

(c) *Parent.* 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 in paragraph (d) of this section. This term does not include parents “in law.”

(d) *Son or daughter.* For purposes of FMLA leave taken for birth or adoption, or to care for a family member with a serious health condition, 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. Regulations at 29 CFR 1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, define these terms.

(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.

(e) *Next of kin of a covered servicemember* means the nearest blood relative other than the covered servicemember’s spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember 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 servicemember, all such family members shall be considered the covered servicemember’s next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember’s only next of kin. See § 825.127(d)(3).

(f) *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. See § 825.121 for rules governing leave for adoption.

(g) *Foster care* means 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. See § 825.121 for rules governing leave for foster care.

(h) *Son or daughter on covered active duty or call to covered 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 covered active duty or call to covered active duty status, and who is of any age. See § 825.126(a)(5).

(i) *Son or daughter of a covered servicemember* means the covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age. See § 825.127(d)(1).

(j) *Parent of a covered servicemember* means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents "in law." See § 825.127(d)(2).

(k) *Documenting relationships.* For purposes of confirmation of family relationship, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, *etc.* The employer is entitled to examine documentation such as a birth certificate, *etc.*, but the employee is entitled to the return of the official document submitted for this purpose.

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**§ 825.123 Unable to perform the functions of the position.**

(a) *Definition.* An employee is unable to perform the functions of the position where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), as amended, 42 U.S.C. 12101 *et seq.*, and the regulations at 29 CFR 1630.2(n). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.

(b) *Statement of functions.* An employer has the option, in requiring cer-

tification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. A sufficient medical certification must specify what functions of the employee's position the employee is unable to perform so that the employer can then determine whether the employee is unable to perform one or more essential functions of the employee's position. For purposes of FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier. See § 825.306.

**§ 825.124 Needed to care for a family member or covered servicemember.**

(a) The medical certification provision that an employee is needed to care for a family member or covered servicemember encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

(b) The term also includes situations where the employee may be needed to substitute for others who normally care for the family member or covered servicemember, or to make arrangements for changes in care, such as transfer to a nursing home. The employee need not be the only individual or family member available to care for the family member or covered servicemember.

(c) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member or covered servicemember includes not only a situation where the condition of the family member or covered servicemember itself is intermittent, but also where the employee is only needed intermittently—such as where other care is