

LABOR AND EMPLOYMENT LAW

INFORMATION MEMO

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New Guidance from U.S. DOL on FMLA Leave for Mental Health Conditions

In connection with Mental Health Awareness Month, the United States Department of Labor (USDOL) has sought to assist employers in better understanding how to comply with the Family Medical Leave Act (FMLA) as it relates to mental health conditions. Accordingly, on May 25, 2022, the USDOL issued new guidance (Guidance) and frequently asked questions (FAQs) on providing FMLA leave to employees to address their own mental health conditions or to care for a covered family member with a mental health condition.

In the Guidance, the USDOL explains that a mental health condition can constitute a “serious health condition” under the FMLA when the condition requires either (1) inpatient care or (2) continuing treatment by a health care provider.

- **Inpatient Care.** A serious mental health condition that requires inpatient care includes a situation in which the individual stays overnight in a hospital or other medical care facility. Examples provided in the Guidance and FAQs include rehabilitation centers for individuals suffering from drug addiction and treatment centers for individuals with eating disorders.
- **Continuing Treatment.** Mental health conditions that require continuing treatment by a health care provider include “[c]onditions that incapacitate an individual for more than three consecutive days and require ongoing medical treatment,” and chronic conditions that cause occasional periods when the individual is incapacitated and requires treatment by a health care provider at least twice a year. The Guidance and FAQs explain that ongoing medical treatment for a mental health condition can either be multiple appointments with a health care provider or a single appointment and follow-up care. Examples of such treatment include behavioral therapy, prescription medications or rehabilitation counseling. The Guidance and FAQs also provide examples of chronic conditions, which include anxiety, depression and dissociative disorders.

Caring for One’s Self or a Covered Family Member. As with serious physical health conditions, an eligible employee working for a covered employer can take FMLA leave to care for their own serious mental health condition or to care for a covered family member with a serious mental health condition. For example, the FAQs explain that an eligible employee would be entitled to FMLA leave to attend a family counseling session for a spouse who is in an inpatient treatment program for substance abuse or to assist a parent receiving medical treatment for depression with day-to-day activities.

The Guidance also clarifies that that a parent may use FMLA leave to care for a child that is 18 years old or older if the child is incapable of self-care and the mental health condition qualifies as a disability under the Americans with Disabilities Act (ADA). Examples of mental health conditions that may constitute disabilities are major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder and schizophrenia. Importantly, the mental health condition does not have to occur or be diagnosed before the child turned 18 years old in order for the parent to receive FMLA leave.

Caring for a Covered Military Servicemember or Veteran. The Guidance explains that an eligible employee may take military caregiver leave under the FMLA for a covered servicemember or veteran with a serious mental health condition when the condition (1) was incurred or aggravated in the line of duty, and (2) makes them unfit to perform their military duties. Although the mental health condition must be incurred or aggravated in the line of duty, it does not have to manifest itself before the servicemember leaves active duty in order for the employee to use FMLA leave. Instead, the Guidance and FAQs indicate that an employee would still be eligible to take FMLA leave to care for a covered veteran whose mental health condition, such a post-traumatic stress disorder, traumatic brain injury or depression, manifested after the individual became a veteran but is related to their military service.

Confidentiality and Protection from Retaliation. The Guidance and FAQs remind employers of their confidentiality and no-retaliation obligations under the FMLA. Employers must keep employees' medical records, including records related to mental health information, confidential and maintain such records in files separate from personnel files. Employers are also prohibited from interfering with, restraining or retaliating against employees for exercising or attempting to exercise any rights under the FMLA.

If you have questions about the topics referenced in this article, please contact [Nicole Price](#), any attorney in our [Labor and Employment practice](#) or the attorney at the firm with whom you are regularly in contact.

