



PERSONNEL AND
READINESS

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

MAY 18 2021

MEMORANDUM FOR SENIOR PENTAGON LEADERSHIP
DEFENSE AGENCY AND DOD FIELD ACTIVITY DIRECTORS

SUBJECT: Amendments to Title II of the Family and Medical Leave Act Expanding Eligibility for the Family and Medical Leave Act and Paid Parental Leave

References: (a) Section 1103 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116-283
(b) Under Secretary of Defense for Personnel and Readiness Memorandum, "Paid Parental Leave," November 5, 2020 (attachment hereby rescinded and reissued)

Reference (a) amended certain Family and Medical Leave Act (FMLA) provisions in title 5, United States Code (U.S.C.). Importantly, it amended section 6381(1) which defines qualifying service for purposes of determining eligibility for FMLA leave, which is a prerequisite to exercising an entitlement to paid parental leave. Effective January 1, 2021, the definition of qualifying service was expanded to include service as an employee, as defined in 5 U.S.C. § 2105, including service with the United States Postal Service, the Postal Regulatory Commission, and a nonappropriated fund instrumentality as described in section 2105(c). Thus, virtually all types of civilian Federal service (including employment on a temporary or intermittent basis) are now qualifying for purposes of applying the FMLA leave eligibility requirement for 12 months of qualifying service. This statutory change supersedes the Office of Personnel Management regulation at 5 CFR § 630.1201(b)(1)(ii).

The new definition of qualifying service means that some employees with Federal service previously treated as not qualifying became eligible for FMLA leave as of January 1, 2021. Significantly, it means such employees may be eligible for paid parental leave (substituted for qualifying FMLA leave). For purposes of implementing the guidance in reference (b), the term "covered employee" includes employees determined to be eligible for FMLA leave as of January 1, 2021, in accordance with the new definition of qualifying service. The reference guide attached to reference (b) is hereby rescinded. An updated reference guide is attached.

For more information, my point of contact is Ms. Kelly Cruz, Director, Employment and Compensation, Defense Civilian Personnel Advisory Service, whom you may reach at (571) 372-1536 or kelly.m.cruz.civ@mail.mil.

Virginia S. Penrod

Virginia S. Penrod
Acting

Attachment:
As stated



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UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

NOV 05 2020

MEMORANDUM FOR SENIOR PENTAGON LEADERSHIP (SEE DISTRIBUTION)
DEFENSE AGENCY AND DOD FIELD ACTIVITY DIRECTORS

SUBJECT: Paid Parental Leave

- References: (a) Title 5, United States Code (U.S.C), Section 6382
(b) Title 5, Code of Federal Regulations (CFR), Part 630
(c) Department of Defense Instruction (DoDI) 1400.25, Volume 630, "DoD Civilian Personnel Management System: Leave," May 8, 2015
(d) DoDI 1400.25, Volume 1406, "DoD Civilian Personnel Management System: Nonappropriated Fund (NAF) Attendance and Leave," March 20, 2015

The Federal Employee Paid Leave Act, enacted pursuant to the National Defense Authorization Act for Fiscal Year 2020, amended reference (a) to provide 12 administrative work weeks of paid parental leave (PPL) to covered employees for the birth or placement of a son or daughter occurring on or after October 1, 2020. On August 10, 2020, the Office of Personnel Management published an Interim Final Rule to implement this provision. The Interim Final Rule amended reference (b) (Absence and Leave), by amending subpart L (Family and Medical Leave), effective October 1, 2020, and adding a new subpart Q (Paid Parental Leave), effective October 10, 2020.

Whether an employee is covered for purposes of PPL is determined by reference to the provisions of the Family and Medical Leave Act (FMLA). Employees who are covered may elect to substitute up to 12 weeks of PPL for unpaid FMLA leave, for the purpose of caring for a son or daughter. Covered employees must use the PPL within 12 months of the date of birth or placement.

To be eligible to use PPL, covered employees must agree in writing to at least a 12-week work obligation, to begin immediately following use of the PPL. Employees who fail to complete the 12-week work obligation following the conclusion of PPL are required to make a reimbursement equal to the total amount of any Government contributions paid by the agency on behalf of the employee to maintain the employee's health insurance coverage during PPL. DoD employees who leave their position for another position within DoD, without a break in service, will continue to meet the 12-week work obligation.

The reimbursement requirement may be waived, at the discretion of the agency, due to unusual circumstances. Employees will not be required to make a reimbursement if unable to return to work because of the continuation, recurrence, or onset of a serious health condition (including mental health) of the employee or the child whose birth or placement was the basis for the PPL, or any other circumstances beyond the employee's control.

Consistent with 5 CFR 630.1701(b)(2) and Enclosure 2 of reference (c), DoD Component Heads are authorized to implement the provisions in references (a) and (b), to include issuing supplemental guidance concerning:

- Documentation required to establish eligibility for PPL;
- Releasing an employee from a work obligation agreement when an employee is unable to return to work because of circumstances beyond the employee's control; and
- Waiving an employee's obligation to reimburse the agency for failure to satisfy the work obligation agreement due to unusual circumstances.

Further delegation is permitted, provided the authority to release an employee from a work obligation agreement or waive the obligation to reimburse the agency is withheld to a level no lower than a management official who is at least one level above the employee's direct supervisor.

This memorandum administratively extends the provisions in reference (b) to NAF activities and employees. These changes will be incorporated into references (c) and (d) as soon as practicable. The attached reference guide contains frequently asked questions and answers.

The time and attendance code for PPL is currently being developed. Until a new code is established, employees should use code "LV." DoD will develop forms for documenting requirements consistent with references (a) and (b). In the interim, DoD Components are advised to follow appropriate records maintenance and management practices. Reference (d) will be updated once this policy is signed.

For more information, my point of contact is Ms. Carlene Wilson, Acting Associate Director, Employment and Compensation, Defense Civilian Personnel Advisory Service (DCPAS), whom you may reach at (571) 372-2258 or carlene.d.wilson2.civ@mail.mil. For NAF-related issues, my point of contact is Ms. Itzel Santana, Associate Director, NAF Personnel Policy, DCPAS, whom you may reach at (571) 372-1565 or itzel.r.santana.civ@mail.mil.



Matthew P. Donovan

Attachment:
As stated

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PAID PARENTAL LEAVE

INTRODUCTION

The Federal Employee Paid Leave Act amended Title II of the Family and Medical Leave Act (FMLA) (5 U.S.C. §§ 6381 et seq.), to permit covered employees to substitute 12 weeks of paid parental leave (PPL) for unpaid leave authorized in connection with the birth, adoption, or foster care placement of a child that occurs on or after October 1, 2020. The regulations implementing paid parental leave are at part 630 (Absence and Leave) of title 5, Code of Federal Regulations (CFR), in subpart L (Family and Medical Leave), revised effective October 1, 2020, and subpart Q (Paid Parental Leave).

Section 1103 of the William M. (Mac) Thornberry National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 further amended Title II of the FMLA. Importantly, 5 U.S.C. § 6381(1)(B) was changed to provide that service as an employee, as defined in 5 U.S.C. § 2105, is qualifying service for purposes of applying the FMLA leave eligibility requirement of 12 months of qualifying service. This amendment supersedes the definition currently listed in 5 CFR § 630.1201(b)(ii), which has not yet been updated to reflect this change.

ELIGIBILITY

To be eligible for PPL, a DoD employee must be eligible for family and medical leave under 5 CFR § 630.1203

Eligibility requirements include:

- Completed at least 12 months of service as a Federal employee, as defined in 5 U.S.C. § 2105.
- Part-time or full-time work schedule; and
- Appointment of more than 1 year in duration.

Employees with an intermittent work schedule are ineligible for paid parental leave. Additionally, employees with temporary appointments not to exceed one year are ineligible for paid parental leave.

The employee must have a qualifying birth or placement event—that is, the birth or placement (for adoption or foster care) of the employee's child must occur on or after October 1, 2020.

An employee who is ineligible for FMLA leave at the time of a qualifying birth or placement event may establish FMLA leave eligibility during the 12-month period following the qualifying birth or placement and use paid parental leave during that period.

ELIGIBILITY EXAMPLES

Example 1. An employee gives birth to a baby on October 3, 2020 and is a full time employee with 2 years of service. The employee is eligible for FMLA leave and immediately eligible to substitute PPL for FMLA leave.

Example 2. An employee gives birth to a baby on September 28, 2020 and is a full time employee with 2 years of service. The employee is eligible for FMLA leave. However, the employee is not eligible for PPL because the qualifying event (the birth) occurred prior to October 1, 2020. The employee cannot substitute FMLA unpaid leave with PPL.

Example 3. An employee gives birth to a baby on October 3, 2020 and is a full time employee with 11 months of service. On November 3, 2020, the employee completes 12 months of Federal service and becomes eligible for FMLA leave. When FMLA leave eligibility is established on November 3, 2020, the employee becomes eligible for PPL and may substitute PPL for unpaid leave used between November 3, 2020 and October 2, 2021.

LEAVE ENTITLEMENT AND USAGE

Paid parental leave is defined as paid time off from an employee's scheduled tour of duty that is granted to cover periods of time within the 12-month period commencing on the date of birth or placement to an employee who has a current parental role in connection with the child whose birth or placement was the basis for granting FMLA unpaid leave under 5 CFR §§ 630.1203(a)(1) or (2).

PPL is limited to 12 administrative workweeks in connection with a birth or placement of an employee's child. An employee must first invoke FMLA unpaid leave for the birth of a child or placement of a child with the employee for adoption or foster care in order to receive paid parental leave. PPL may be substituted for FMLA unpaid leave. If two covered Federal employees are parents of the same newly born or placed child, each employee would have their own separate FMLA leave entitlement based on the birth/placement event. Additionally, each employee-parent would have a separate entitlement to substitute PPL.

Any use of FMLA leave for purposes other than the birth or placement of the child during a 12-month period may reduce the FMLA leave available. In this case, it would also reduce the amount of available PPL, since the substitution of PPL requires the use of FMLA leave.

FMLA leave (and substitution of PPL) for the birth or placement of a child may only be used during the 12-month period following the birth or placement event. It is important to consider the time period applicable to use of FMLA leave for birth/placement and the time periods applicable to use of FMLA leave for other purposes when calculating an employee's entitlements.

LEAVE ENTITLEMENT EXAMPLES

Example 1. An employee has not previously invoked FMLA. On October 12, 2020, a qualifying birth event occurs. The employee invokes FMLA unpaid leave on October 12, 2020 and substitutes PPL on the same date. In this example, the FMLA period is from October 12, 2020-October 11, 2021. The 1-year period based on the birth/placement event is also from October 12, 2020-October 11, 2021. The employee would be entitled to substitute 12 weeks of PPL during this period.

Example 2. An employee has not previously invoked FMLA. On October 12, 2020, a qualifying birth event occurs. The employee takes 6 weeks of sick leave for their recovery from childbirth. They do not invoke FMLA during this time since it is not necessary to do so. The employee invokes FMLA leave on November 23, 2020 and substitutes PPL, starting on the same date. In this example, the FMLA period for purposes of substituting PPL is from November 23, 2020-October 11, 2021. Even though the employee did not invoke FMLA on the day of the birth event, the FMLA period must end 12 months after the birth event. The employee would be entitled to substitute 12 weeks of PPL between November 23, 2020-October 11, 2021.

Example 3. An employee invoked FMLA to care for a sick family member on April 20, 2020 and used 2 weeks of FMLA leave. The FMLA period is from April 20, 2020-April 19, 2021. On October 12, 2020, a qualifying birth event occurs. On October 12, 2020, the employee invokes FMLA unpaid leave based on the birth of their child and substitutes 10 weeks of PPL. In this example, FMLA leave and the substitution of PPL is limited to 10 weeks, since the employee already used 2 weeks of FMLA leave and such leave may not exceed a total of 12 weeks of FMLA leave during the FMLA period. The 1-year period based on the birth/placement event is from October 12, 2020-October 11, 2021. On April 20, 2021, a new FMLA period begins and the employee may invoke FMLA and substitute 2 weeks of PPL for FMLA leave at this point, since they have 2 additional weeks of PPL still available. The remaining PPL must be used from April 20, 2021-October 11, 2021.

MULTIPLE BIRTH/PLACEMENT EVENTS

If an employee has multiple children born or placed on the same day, the multiple-child birth/placement event is considered to be a single event that initiates a single entitlement of up to 12 weeks of PPL.

If an employee has one or more children born or placed during the 12-month period following the date of an earlier birth or placement of a child of the employee, each event will generate a 12-week leave entitlement to be used during the 12-month period following birth/placement. Any use of PPL during an overlap period (period containing more than one 12-month period following birth/placement) will count toward the 12-week limit for each birth/placement involved.

Example: An employee has not previously invoked FMLA. On October 12, 2020, their qualifying birth event occurs. The employee immediately invokes FMLA unpaid leave on October 12, 2020, and substitutes 12 weeks of PPL on the same date. The employee's FMLA period and the 1 year period based on the birth/placement event is from October 12, 2020- October 11, 2021. On August 23, 2021, the employee adopts a child. Since the date of the placement is within the 1 year period based on the previous birth and the employee has already utilized 12 weeks of PPL, the employee would not have any PPL or FMLA leave available for use. On October 12, 2021, the employee may invoke FMLA based on the placement event and the new FMLA period begins. The employee may then substitute 12 weeks of PPL for 12 weeks of FMLA leave. The PPL must be used during the new FMLA period from October 12, 2021-August 22, 2022.

DOCUMENTATION

Employees must invoke their entitlement to FMLA unpaid leave and request to substitute PPL for unpaid leave, in writing. They must also agree to perform at least 12 weeks of work following use of such leave, in writing. DoD forms for these purposes are being developed which will include appropriate records maintenance/management practices. In the interim, DoD Components may accept other written forms of communication that are signed by the employee. DoD Components may also provisionally approve unsigned requests, such as email or text, but must obtain a signed written service agreement within 24 hours.

If an employee is physically or mentally incapable of signing a work obligation agreement, the employee may, within 5 workdays of the employee's return to duty status, sign a work agreement and make an election to substitute PPL for FMLA unpaid leave on a retroactive basis.

At the request of the Component, an employee must provide documentation that shows that the employee's use of PPL is directly connected to a birth or placement that has occurred. The DoD Component Heads have been delegated the authority to determine what documentation is sufficient proof of entitlement to PPL.

WORK OBLIGATION

Employees utilizing PPL are required to work for the employing agency for 12 weeks after the day on which the PPL concludes. If an employee fails to complete the 12-week obligation following use of PPL, the employee will be required to make a reimbursement equal to the total amount of any Government contributions paid by the agency on behalf of the employee to maintain the employee's health insurance coverage under the Federal Employees Health Benefits Program, established under Chapter 89 of title 5, U.S.C., or other Federal Governmental health plan, such as the DoD Nonappropriated Fund (NAF) Health Benefit Plan established in accordance with section 349 of Public Law (P.L.) 103-337 and section 1587 note of title 10, U.S.C., during the period(s) when PPL was used. The total amount may not be prorated. The DoD Component may waive the reimbursement requirement due to unusual circumstances.

The employee is not considered to have failed to complete the 12-week work obligation if the employee moves within DoD to another DoD Component without a break in service. Additionally, the employee is not required to make a reimbursement if the employee is unable to return to work for the required 12 weeks because of the continuation, recurrence, or onset of a serious health condition (including mental health) of the employee or the child whose birth or placement was the basis for the PPL; or any other circumstances beyond the employee's control.

Determination that an employee is unable to return to work because of circumstances beyond the employee's control, and waiver of the reimbursement requirement due to unusual circumstances must be approved by a management official at least one level above the employee's direct supervisor.

FREQUENTLY ASKED QUESTIONS

Q1. If an employee gives birth before October 1, 2020, may they use PPL?

A1. No, PPL may only be granted in connection with birth or placement events on or after October 1, 2020.

Q2. Who may be granted PPL?

A2. Employees who meet eligibility requirements to invoke FMLA unpaid leave based on 5 CFR §§ 630.1203(a)(1) or (2) may substitute PPL for FMLA unpaid leave, in accordance with 5 CFR §§ 630.1701 – 630.1708. Importantly, 5 U.S.C. § 6381(1)(B), as amended by the NDAA for FY 2021, provides that service as an employee, as defined in 5 U.S.C. § 2105, is qualifying service for purposes of applying the FMLA leave eligibility requirement of 12 months of qualifying service. This supersedes the definition of qualifying service currently listed in 5 C.F.R. § 630.1201(b)(ii).

Q3. Are NAF employees eligible for PPL?

A3. Certain NAF employees, those who meet eligibility requirements to invoke FMLA unpaid leave based on subparts 630.1203(a)(1) or (2) of title 5, CFR, may substitute PPL for FMLA unpaid leave. The regulations in part 630, subpart Q of title 5, CFR, have been administratively extended to these NAF employees.

Q4. If both parents are Federal employees, are they both entitled to PPL?

A4. Yes, each employee has a separate FMLA/PPL entitlement based on the birth/placement event. The parents can choose to use their leave entitlements to cover the same period of time or different periods of time.

Q5. When can PPL be granted?

A5. PPL can be granted to employees following FMLA invocation based on a qualifying birth, adoption, or placement event. It may only be granted for time when an employee has a “parental” role. A parent who does not maintain a continuing parental role with respect to a newly born or placed child would not be eligible for paid parental leave once the parental role has ended.

Q6. Can PPL be used before the birth or placement of a child?

A6. No, PPL can only be substituted after the birth or placement event. An employee may use FMLA unpaid leave prior to the birth or adoption. However, use of FMLA unpaid leave in these cases will affect how much PPL an employee can receive after the birth event. An employee may request to use annual leave or sick leave prior to the birth or adoption, without invoking FMLA and the agency may exercise its normal authority with respect to approving or disapproving the timing of when the leave may be used.

Q7. Can PPL be used for recovery following childbirth?

A7. PPL may be used during periods of recovery from childbirth as long as the employee maintains a continuing parental role with respect to a newly born child. PPL continues to be available only as long as the employee has a continuing parental role with respect to the newly born or placed child. Therefore, PPL may not be used exclusively for the purposes of recovery from childbirth. For example, in cases where an employee serves as a surrogate, the employee would not be eligible for PPL.

Q8. Are employees required to use all available sick and annual leave before using PPL?

A8. No, employees are not required to use sick or annual leave prior to using PPL.

Q9. Are employees required to use PPL immediately following the birth or placement event?

A9. No, employees may invoke FMLA unpaid leave and request substitution of PPL at any time during the 12 month period following the birth/placement event. For example, an employee may use sick leave during recovery from childbirth prior to invoking FMLA and substituting PPL.

Q10. Can employees use PPL intermittently?

A10. Yes, PPL may be used intermittently when both the Agency and the employee agree to intermittent use.

Q11. Can a request for PPL be denied?

A11. PPL is an entitlement. As long as all of the requirements contained in part 630 of title 5, CFR, are met, an employee's invocation of continuous FMLA unpaid leave and substitution of PPL cannot be denied. However, intermittent use of PPL requires agency approval. Approval of requests for intermittent FMLA leave after childbirth is encouraged to the maximum extent practicable. To minimize the impact on agency operations, supervisors and employees should work together to schedule intermittent FMLA leave in advance and develop an intermittent or reduced work schedule that supports both employee and agency needs.

Q12. What are employees required to provide before using PPL?

A12. Employees must invoke their entitlement to FMLA unpaid leave and request to substitute PPL for unpaid leave, in writing. They must also agree to perform at least 12 weeks of work following use of such leave, in writing. Employees may submit a written request in advance of a qualifying birth or placement event which details their anticipated use of PPL. DoD Components may request documentation from the employee that shows the use of PPL is directly connected to a birth or placement that has occurred.

Q13. If an employee fails to meet the 12-week work obligation following use of PPL, what reimbursement is required?

A13. Employees who fail to complete the 12-week work obligation following the conclusion of PPL, must make a reimbursement equal to the total amount of any Government contributions paid by the agency on behalf of the employee to maintain the employee's health insurance coverage during the period when PPL was used. Appropriated-fund employees must reimburse the agency for Government contributions to maintain health insurance coverage under the Federal Employees Health Benefits Program, established under Chapter 89 of title 5, U.S.C. NAF employees must reimburse the agency for Government contributions to maintain health insurance coverage under the DoD NAF Health Benefit Plan established in accordance with Section 349 of P.L. 103-337 and section 1587 (note) of title 10, U.S.C. Regardless of any indebtedness to the agency, employees remain covered under the applicable health insurance plan during the period when PPL was used.

Q14. What code should employees use to document PPL in the time and attendance system?

A14. The time and attendance code for PPL is currently being developed. In the interim, until a new code is established, employees should use code "LV".

Q15. What is the impact of the NDAA for FY 2021 amendments to 5 U.S.C. § 6381(1)(B) concerning what constitutes 12 months of qualifying Federal service for eligibility to take FMLA leave?

A15. The amendments concerning eligibility to take FMLA leave, contained in section 1103 of the NDAA for FY 2021, became effective on January 1, 2021. Thus, they do not affect the FMLA leave eligibility rule applicable during periods of time before January 1, 2021. However, beginning January 1, 2021, some employees with Federal service previously treated as not qualifying became eligible for FMLA leave under the new eligibility rule. If such an employee has a qualifying birth or placement event, the employee may be eligible to prospectively take FMLA leave during the remainder of the 12 month period after the qualifying event, and substitute PPL.

REFERENCES

5 U.S.C. Chapter 63, Subchapter V
5 CFR part 630, Subpart L – Family and Medical Leave, (subpart 630.1201(b)(1)(ii) superseded by
5 U.S.C. § 6381(1)(B), as amended by section 1103 of NDAA for FY 2021
5 CFR part 630, Subpart Q – Paid Parental Leave
Office of Personnel Management Memorandum, dated January 14, 2021
(<https://www.chcoc.gov/content/technical-amendments-related-family-and-medical-leave-and-paid-parental-leave-under-section>)

CONTACT

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