

## Department of Labor clarifies FMLA leaves to care for adult children with a disability: Parents of disabled adult children

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The Family and Medical Leave Act (FMLA) requires covered employers to provide 12 weeks of unpaid, job-protected FMLA leave to qualifying employees who need to care for their “son [or] daughter” who has a serious health condition. The FMLA defines son or daughter as an individual who is either under 18 years of age or “18 years of age or older and incapable of self-care because of a mental or physical disability.” The FMLA does not specifically address whether the adult child’s disability must have arisen before the child is 18 years of age.

On January 14, 2013, the U.S. Department of Labor (DOL) answered this question, clarifying that “the age of a son or daughter at the onset of a disability is not relevant in determining a parent’s entitlement to FMLA leave.” (Administrator’s Interpretation No. 2013-1.) This interpretation considerably expands the availability of leave for parents, allowing leave to care for children with disabilities arising during adulthood such as those resulting from vehicle accidents, disease, addiction or injuries during military service.



Several conditions must be met for FMLA leave requirements to apply. First, the employer must be a covered employer, which means that it employs 50 employees or more each working day during 20 or more calendar weeks of the year. Second, the employee requesting leave must work at a location where the employer has 50 or more employees within a 75-mile radius. Third, parents must meet the FMLA’s 12-month length-of-employment and 1,250 hours-worked requirements to be eligible for leave to care for a minor or adult child.

Additional requirements apply to parents taking leave to care for adult children. These requirements focus on the adult child. The adult child must: (1) have a disability as defined by the Americans with Disabilities Act (ADA); (2) be incapable of self-care due to that disability; (3) have a serious health condition as defined by the FMLA; and (4) be in need of care for that serious health condition.

The adult child must meet all four of the criteria before a parent is eligible to take leave to care for the child. Each criterion uses its own definitions, which forces employers to complete separate analyses for each criterion. For example, the adult child may be disabled under the ADA but not have a serious health condition under the FMLA. In that case, the parent is not eligible for FMLA leave.

Set out below is a summary of each requirement, and the effect of the DOL Guidance on families with adult children disabled during military service.

### 1: The adult child has a disability as defined by the ADA

The FMLA adopts the ADA Amendment Act’s (ADAAA) definition of disability, which is “an impairment that substantially limits one or more major life activities.” The ADAAA broadened the coverage of the ADA by increasing the number and variety of qualifying “major life activities,” and clarifying that “substantially limits” does not mean that the impairment prevents, or even significantly restricts, the major life activity.

Further, in determining whether an impairment is a disability the use of mitigating measures to ameliorate the effects of an impairment may not be considered by the employer. Finally, conditions may be disabilities even if they are in remission or episodic; that is, even if the symptoms of the condition are dormant.

### 2: The adult child is incapable of self-care due to the disability

Incapable of self-care means that the adult child needs active assistance or supervision with three or more activities of daily living. Daily living activities include not only maintaining hygiene and eating, but extend to maintaining a residence, managing medication, and using basic services such as public transportation and the post office. Significantly, an adult child whose condition is in remission may not meet this requirement because she is capable of self-care.

### 3: The adult child has a serious health condition

The FMLA defines a “serious health condition” as an “illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider.”

### 4: The adult child is in need of care due to the serious health condition

An adult child is in need of care under the FMLA if, for example, he or she is “unable to care for his . . . own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself . . . to the doctor.”

The adult child must meet all four criteria before a parent/employee may take FMLA leave to care for him or her.

The availability of leave for adult-onset disabilities, when combined with FMLA military caregiver leave, considerably expands the leave allowed for parents of service-disabled veterans. The FMLA already grants 26 weeks of special military caregiver leave, within a 12-month period, to immediate relatives of a covered servicemember with a serious injury or illness either incurred or aggravated by military service to care for that servicemember. The January 14, 2013 DOL Guidance expands on this leave by providing 12 weeks of leave in each subsequent 12-month period in which the servicemember meets the four-factor test for leave to care for an adult child with a disability.

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