§ 825.122 Definitions of covered servicemember, spouse, parent, son or daughter, next of kin 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.

(b) Spouse. Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

(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 pur-
poses of military caregiver leave under the FMLA. When no such designation
is made, and there are multiple family members with the same level of rela-
tionship to the covered servicemember, all such family members shall be con-
sidered the covered servicemember’s next of kin and may take FMLA leave
to provide care to the covered servicemember, either consecutively or simul-
taneously. 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 perma-
nently 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 other-
wise) is not a factor in determining eli-
gibility 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 par-
ent or guardian that the child be re-
moved 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 em-
ployee 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 service-
member means the covered servicemember’s biological, adopted, or
foster child, stepchild, legal ward, or a
child for whom the covered service-
member 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 bio-
logical, adoptive, step or foster father
or mother, or any other individual who
stood in loco parentis to the covered
servicemember. This term does not in-
clude parents “in law.” See
§825.127(d)(2).

(k) Documenting relationships. For
purposes of confirmation of family re-
lationship, the employer may require
the employee giving notice of the need
for leave to provide reasonable docu-
mentation or statement of family rela-
tionship. 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 docu-
mentation such as a birth certificate,
etc., but the employee is entitled to the
return of the official document sub-
mitted for this purpose.

§ 825.123 Unable to perform the func-
tions 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 mean-
ing 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 ab-
sent from work to receive medical
treatment for a serious health condi-
tion is considered to be unable to per-
form the essential functions of the po-
sition during the absence for treat-
ment.

(b) Statement of functions. An em-
ployer 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 employ-
ee’s position the employee is unable to
perform so that the employer can then
determine whether the employee is un-
able to perform one or more essential
functions of the employee’s position.
For purposes of FMLA, the essential