

Time off from Civilian Job To See Wife Return from Afghanistan— Good News from Maryland

By LTC Conrad S. Kee, USAR[\[1\]](#) and
Captain Samuel F. Wright, JAGC, USN (Ret.)

1.8—Relationship between USERRA and other laws/policies

9.0—Miscellaneous

Q: I work for a small company in Maryland. The company has 48 employees at the principal location in Baltimore and another 15 at a small branch office in the Maryland Panhandle, more than 100 miles away. My wife is a Major in the Army Reserve[\[2\]](#) and has been in Afghanistan on active duty for almost a year. She is expected to arrive at Andrews Air Force Base (AFB) in Maryland on October 2, 2013, and I want to be there (along with almost all the other spouses) to welcome her home.

I have had some serious health issues over the last few months, and I have exhausted all my sick leave and vacation at the company. I want to take a day off from work on October 2 to participate in the welcome home ceremony at Andrews AFB for my wife and her unit as they return from a year in Afghanistan. I need to miss one more day of work, and I would be willing to take it without pay. The company's personnel director told me that I cannot have the day off because I have exhausted all my vacation and that if I am not at work on October 2 I will be fired. The personnel director also told me that I have no recourse—the company is not covered by the FMLA because it has fewer than 50 employees at the principal office in Baltimore.

What is the FMLA? Is the personnel director correct?

A: The Family Medical Leave Act (FMLA) is an important federal statute that was signed into law 20 years ago, in 1993. This law provides up to 12 weeks of unpaid, job-protected leave to eligible employees of covered employers for the following reasons:

1. Incapacity due to pregnancy, prenatal medical care or child birth.
2. To care for the employee's child after birth or placement for adoption or foster care.
3. To care for the employee's spouse, son or daughter, or parent who has a serious health condition.
4. For the employee's serious health condition that makes the employee unable to perform the employee's job.

After the terrorist attacks of September 11, 2001, Congress has amended the FMLA to add additional circumstances for FMLA leave. An eligible employee with a spouse, son, daughter, or parent on active duty or called to active duty status in the National Guard or Reserve in support of a contingency operation may use his or her 12-week FMLA leave entitlement to address certain qualifying exigencies, including attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings.

The FMLA also includes a special leave entitlement that permits an eligible employee to take up to 26 weeks of unpaid leave to care for a covered service member during a single 12-month period. A covered service member is a current member of the Armed Forces, including a member of the National Guard or Reserve, who has a serious injury or illness incurred in the line of duty while on active duty that may render the service member medically unfit to perform his or her duties and for which the service member is undergoing medical treatment, recuperation, or therapy or is in an outpatient status or is on the Temporary Disability Retired List.

The post-9/11 expansions of the FMLA have been most welcome, but it should be noted that these recent amendments have not changed the FMLA applicability thresholds, which have remained unchanged since the law was enacted in 1993. Your company's personnel director is correct that the FMLA does not apply because there are fewer than 50 employees at the Baltimore location and it is more the 75 miles from the only other location.[\[3\]](#)

The good news is that Maryland has enacted a pertinent new state law. Effective October 1, 2013, Maryland employers must provide employees with one day of unpaid leave to be used on the day the employee's "immediate family member" is leaving for or returning from active military duty outside the United States as a member of the armed forces. "Immediate family member" is defined as the employee's spouse (including a same-sex spouse), parent, stepparent, child, stepchild or sibling. The new law (which will be codified at Article – Labor and Employment, Section 3–803 Annotated Code of Maryland) applies to employers with at least 50 employees. An employee taking the unpaid leave must have worked for a covered employer on a full-time or part-time basis for at least 1,250 hours during the last 12 months. The law prohibits employers from requiring employees to use paid leave to cover this one-day leave-of-absence, although employers covered by the federal Family and Medical Leave Act could designate this leave as qualifying exigency leave. Employers may require employees to provide documentation supporting the need for leave.

Maryland joins several other states (including California, Illinois, Indiana, Maine, Minnesota, Nebraska and New York) with laws providing for short-term leaves for family members of military service members.

[1] Military title shown for purposes of identification only. The views expressed in this article are of the author alone and should not be attributed to the Department of the Army, the Department of Defense, or the United States Government. The author is a partner in the prominent employment law firm Jackson Lewis, and he has offices in Stamford, Connecticut and Denver, CO. He is a judge advocate in the Army Reserve and a member of ROA.

[2] The answer would be the same if she were in the Regular Army or the Army National Guard.

[3] The FMLA also requires that the employee taking FMLA leave must have worked for the employer for at least a year and must have worked at least 1250 hours for the employer during the last 12 months before the proposed FMLA leave.