

**Caring for Disabled Adult Children under the FMLA**

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The U.S. Department of Labor recently provided [guidance](#) on when employees may take federal FMLA leave to care for an adult child who is incapable of self-care because of a disability. The FMLA entitles an eligible employee to take up to 12 workweeks of unpaid, job-protected leave during a 12-month period to care for a son or daughter with a serious health condition. The FMLA defines a “son or daughter” as a “biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is—(A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability.”

Under this definition, an employee may take FMLA leave to care for a child under 18 years of age, without regard to whether the child has a disability. An employee must only show a need to care for the child due to a serious health condition.

However, if the child is 18 years or older, the employee must show the “son or daughter” has a mental or physical disability **and** is incapable of self-care because of that disability. In defining “mental or physical disability,” the Americans with Disabilities Act’s (ADA) definition of “disability” applies. That is, “a physical or mental impairment that substantially limits a major life activity,” as amended by the broader definitions contained in the Americans with Disabilities Act Amendments Act (ADAAA).

Assuming the child is disabled, as defined by the ADAAA, he or she must also be “incapable of self-care because of the disability” to meet the definition of a covered “son or daughter.”

The new regulations define “incapable of self-care because of mental or physical disability” to require “active assistance or supervision to provide daily self-care in three or more of the activities of daily living or instrumental activities of daily living.” More specifically an employee requesting leave must show all the following are met: The adult son or daughter (1) has a disability as defined by the ADAAA, regardless of how old the child was at the time the disability began; (2) is incapable of self-care due to that disability; (3) has a serious health condition; and (4) is in need of care due to the serious health condition.

The guidance also pertains to military caregiver leave. Under the military caregiver provision of the FMLA, a parent of a covered servicemember who sustained a serious injury or illness is entitled to up to 26 workweeks of FMLA leave in a single 12-month period if all other requirements are met. Now, when the injured servicemember requires care beyond the initial 12 month caregiver period, the FMLA will allow parents to continue such care of their wounded adult child as long as all other FMLA requirements are met.

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