

Recent Family and Medical Leave Act Rule Changes Related to Military Status

When the Family and Medical Leave Act (FMLA), was originally enacted in 1993, it provided an entitlement to job-protected unpaid leave for eligible, covered employees. The leave could extend to as much as 12 weeks during any 12-month period. Two “types” of leave were provided. The first was family leave, for the care of the employee's newborn child or the placement for adoption or foster care of a child with the employee. The second was medical leave and involved the care of an immediate family member (spouse, child, parent) who has a serious health condition, or the care of the employee's own serious health condition.

In 2008, the FMLA was amended to add military leave provisions. Under the amendment, a "spouse, son, daughter, parent, or next of kin" may take up to 26 work weeks of leave to care for a member of the Armed Forces (including 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." This amendment also permitted an employee to take FMLA leave for "any qualifying exigency . . . arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation." Regulations implementing these statutory changes were issued by the Department of Labor in 2008.

The National Defense Authorization Act for Fiscal Year 2010 (the “FY 2010 NDAA”) amended and supplemented the FMLA military leave provisions that had been added in 2008. On March 8, 2013, the U.S. Department of Labor issued the Final Rule implementing these latest statutory amendments, including those changes discussed below.

A. Qualifying Exigency Leave

Military exigency leave is now limited to those exigencies that are incident to a family member’s deployment to a foreign country. Previously, this leave was available where a family member in the National Guard or Reserves was called or notified of a call to active duty in support of a contingency operation. Having a family member in the Regular Armed Forces who was deployed or on orders to be deployed, did not qualify the employee for exigency leave. The availability of exigency leave now includes employees who have family members in the Regular Armed Forces, not just the National Guard of Reserves, who deploy to foreign countries. In addition, a new qualifying exigency leave category for parental care leave has been added that allows eligible employees to take short periods of leave to care for a military member’s parent who is incapable of self-care when the care is necessitated by the military member’s covered active duty. Finally, the amount of time an eligible employee may take for Rest and Recuperation qualifying exigency leave has been increased from five to a maximum of 15 calendar days.

B. Military Caregiver Leave

An eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member with a serious injury or illness incurred in the line of duty on active duty for

which the service member is (1) undergoing medical treatment, recuperation, or therapy, (2) is otherwise in outpatient status, or (3) is otherwise on the temporary disability retired list, may under present law, take up to 26 workweeks of FMLA leave to care for the service member in a single 12-month period. The definition of a “covered service member” has been expanded to include veterans who are undergoing medical treatment, recuperation, or therapy for a serious injury or illness. For these purposes, a covered veteran is an individual who was discharged or released under conditions other than dishonorable from the Regular Armed Forces, Reserves or National Guard at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran.

C. Definition of Serious Injury or Illness

The definition of a serious injury or illness has been expanded to include pre-existing injuries or illnesses that were aggravated by service in the line of duty while on active duty in the Armed Forces. Additionally, the definition of serious injury or illness now includes both mental and physical conditions, incurred or aggravated in the line of duty while the veteran was on active duty in the Armed Forces. Covered conditions include those that manifest themselves either before or after the service member became a veteran.

D. Required Information for Certification of a Qualifying Exigency

The list of information required to support leave for Rest and Recuperation has been expanded to include a copy of the military member’s Rest and Recuperation leave orders, or other documentation issued by the military setting forth the dates of the military member’s leave.

E. Certification of Military Caregiver Leave

The list of health care providers who are authorized to complete a certification for military caregiver leave for a covered service member is expanded to include certain health care providers who are not affiliated with DOD, VA, or TRICARE. Second and third opinions may be required by an employer for military caregiver leave certifications that are completed by health care providers who are not affiliated with DOD, VA, or TRICARE.

These changes have been presented above in summary form. Supervisors dealing with situations involving military status of the employee’s family members should immediately seek the advice of Human Resources or the Office of Counsel.