Department of Labor Clarifies FMLA Amendments Related to Servicemember Care and Other Military-Related Exigencies

November 2008

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The Department of Labor (DOL) published its final version of the changes to the regulations interpreting the Family and Medical Leave Act (FMLA) on November 17, 2008, and it has clarified many of the ambiguities created by the statutory amendments passed on January 28, 2008. The regulations are effective on January 16, 2009. Most notably, the new regulations define the term "military exigency" and provide guidance to employers on how to process requests for this type of leave. The DOL has also answered the hotly debated issue about whether employees who seek leave to care for a seriously injured or ill servicemember are limited to only one 26-week leave period during their entire employment or one per 12-month period. The final regulations provide that, depending on the circumstances, an employee may take more than one 26-week leave period during his or her employment. This ASAP will explain some of the highlights of the final regulations related to military leave under the FMLA. For a discussion of the newly issued final regulations related to general FMLA leave, please see Littler's ASAP, *Relief in Sight? DOL Issues Final FMLA Regulations*.

Military Caregiver Leave

Since the amendments to the FMLA were signed into law in January 2008, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a "covered servicemember" has been entitled to take up to 26 workweeks of leave during a single 12-month period to care for the servicemember. For purposes of military caregiver leave, a *covered servicemember* is defined as "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 an outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness incurred in the line of duty on active duty." Thus, military caregiver leave is *not* limited to members of the National Guard or Reserves who are on active duty or have been called to active duty status, as is the case with qualifying exigency leave, discussed below.

The final regulations provide much-needed guidance to employers and employees about their rights and responsibilities with respect to this new form of FMLA leave. Whenever possible, the DOL has incorporated the same or similar procedures for taking military caregiver leave as are applied to other forms of FMLA leave.

New Definitions for Eligible Family Members

The final regulations include a change in three important definitions. First, the definition of a "son or daughter" has been expanded. In the existing FMLA, a *son or daughter* must be: (1) under 18 years of age; or (2) 18 years of age or older and incapable of self-care because of a mental or physical disability. If this same definition were applied to military caregiver leave, adult children would not be able to take leave to care for a parent who is a covered servicemember. To remedy this situation, the definition of *son or daughter* for purposes of military caregiver leave has been revised to apply to the covered servicemember's "biological, adopted, or foster child, stepchild, legal ward, or a child for whom the servicemember stood in loco parentis, and who is of any age."

Second, *parent of a covered servicemember* is defined as the "covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember." This definition does not include parents-in-law.

Third, to avoid potentially inconsistent state law definitions of "next of kin," the new regulations define *next of kin of a covered servicemember* as the servicemember's nearest blood relative (other than the covered servicemember's spouse, parent, son, or daughter, who are already entitled to leave for this purpose) in the following order of priority: blood relatives who have been granted legal custody of the servicemember, brothers and sisters, grandparents, aunts and uncles, and first cousins.

Family members sharing the same level of familial relationship, *i.e.*, all siblings, will be considered the servicemember's next of kin and each will be entitled to take military caregiver leave to care for the covered servicemember. A covered servicemember may expressly designate a blood relative to serve as his or her only next of kin for military caregiver leave.

An employer may request reasonable documentation (*i.e.*, a simple written statement or other document from the employee) to confirm the employee's family relationship to a covered servicemember.

Entitlement to 26 Weeks of Military Caregiver Leave

An eligible employee is entitled to a combined total of 26 workweeks of leave for military caregiver leave and leave for any other FMLA-qualifying reason during the same "single 12-month period," provided that the employee takes no more than 12 workweeks of leave because of a qualifying exigency or for any other FMLA-qualifying reason. A "single 12-month period" begins on the first day the eligible employee takes military caregiver leave and ends 12 months after that date, regardless of the method used by the employer to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons. If the employee takes less than 26 weeks of leave during that 12-month period, the unused weeks would be forfeited.

Military caregiver leave is to be applied on a per-covered-servicemember, per-injury basis. In other words, an eligible employee may be entitled to take more than one period of 26 workweeks of leave during his or her employment if the leave is to care for different covered servicemembers *or* to care for the same servicemember with a *subsequent* serious injury or illness, except that no more than 26 workweeks of leave may be taken (for any FMLA-qualifying reason) within any "single 12-month period."

The regulations explicitly allow an employee to split the 26 weeks of leave for different reasons. For example, an eligible employee may, during the single 12-month period, take 18 weeks of FMLA leave to care for a covered servicemember and 8 weeks of FMLA leave because of the employee's own serious health condition, so long as the employee does not take more than 12 weeks of leave due to his or her own serious health condition or any other FMLA-qualifying reason.

Employees are permitted to take military caregiver leave on an intermittent basis not only in situations where intermittent leave is medically necessary for the treatment of the servicemember, but also where the employee is needed only intermittently – such as where other care is usually available or care responsibilities are shared with another family member or a third party.

Characterization of Leave

Military caregiver leave should be designated, and may be applied retroactively, in the same manner as designation is made for other forms of FMLA leave. As with other forms of FMLA leave, it is the employer's responsibility to designate the leave as FMLA-qualifying leave and to provide the employee with notice of the designation, including whether the leave will be paid or unpaid. If military caregiver leave also qualifies for leave to care for a family member with a serious health condition during the "single 12-month period," the employer must first designate the leave as military caregiver leave. In other words, the two forms of FMLA leave do not run concurrently and, therefore, the leave time should not be counted both as leave to care for a covered servicemember and leave to care for a family member with a serious illness.

A husband and wife who are eligible for FMLA and who work for the same covered employer (even if they work at different worksites, in different operating divisions, or are located more than 75 miles apart) may be limited to a combined total of 26 workweeks of FMLA leave during a "single 12-month period." If one spouse is ineligible for FMLA leave, however, the other spouse would be entitled to the full 26 weeks.

Certification of Need for Leave

An employer may request that an employee seeking to take military caregiver leave obtain medical certification that the servicemember's serious illness or injury was "incurred in the line of duty on active duty in the Armed Forces." Because these are military terms of art, the request may be supported by certification from a: (1) Department of Defense (DOD) health care provider; (2) Department of Veteran's Affairs health care provider; (3) DOD TRICARE network (health care resources of the uniformed services partnered with civilian health care professionals, institutions, pharmacies, and suppliers) authorized private health care provider; or (4) DOD non-network TRICARE authorized private health care provider.

In addition to the general certification requirements for other types of FMLA-qualifying leave, the health care provider may certify that the servicemember is undergoing medical treatment, recuperation or therapy for a serious injury or illness that was incurred in the line of duty.

An employee may support a request for military caregiver leave by completing the employer's certification form, by submitting the DOL's new optional Form WH-384, or by submitting "invitational travel orders" (ITOs) or "invitational travel authorizations" (ITAs), which are issued to family members to join an injured or ill servicemember at his or her bedside. If additional leave is required beyond that specified in the ITO or ITA, the employer may request that the employee complete the employer's form or the WH-384. An employer may request clarification of the certification, but it may not request second or third opinions or recertifications.

The final regulations clarify that there is no temporal proximity requirement between the time of the covered servicemember's injury or illness and the treatment, recuperation, or therapy, except that the covered servicemember must be a current member of the Armed Forces, National Guard, or Reserves or on the temporary disability retired list.

Effect of Injury or Illness Arising After Military Service Ends

The definition of *covered servicemember* includes *current* members of the Regular Armed Forces, National Guard or Reserves, as well as members of the Regular Armed Forces, National Guard or Reserves who are on the temporary disability retired list. By definition, therefore, *former* members of the Armed Forces, National Guard or Reserves, and members on the *permanent* disability retired list are not considered to be covered servicemembers.

The rationale is that a former servicemember would not suffer from a "serious illness or injury" that renders the member medically unfit to perform the duties of the member's office, grade, rank or rating. Thus, the serious illness or injury must manifest itself before the servicemember is discharged, resigns or retires (unless the retired member is on the temporary disability retired list).

Qualifying Exigency Leave

The January 2008 amendments provided that an eligible employee may take up to 12 weeks of unpaid leave if the employee's spouse, child or parent is a member of one of the U.S. Armed Force's Reserve Components or National Gaurd on active duty or is a reservist or member of the National Gaurd who faces recall to active duty if a qualifying exigency exists. The term "qualifying exigency" was not defined in the amendments, and employers were not required to provide this type of leave until the DOL issued final regulations.

The DOL has now defined the term "qualifying exigency" by providing a non-exhaustive list of the types of circumstances that will qualify. The new regulations also make clear that to be eligible for this type of leave, the employee's family member must be a member of the military reserves or National Guard when called to active duty and not already on active duty in the regular U.S. Armed Services. Although the term "active duty" is commonly used to refer to those serving in the regular U.S. Armed Forces, the DOL has made it clear that qualifying exigency leave is ***not***available to employees whose family members serve the regular military. Such leave ***only*** applies to reservists and National Guard members who are on active duty. Additionally, leave is only available for employees of National Guard members who are called to active ***federal*** service by the President and is not available for those in the Guard who are recalled to state service by the governor of the member's respective state.

What Is a Qualifying Exigency?

The final regulations clarify the meaning of "qualifying exigency" by providing a list of specific examples of such exigencies as well as a catch-all provision that requires the employer and employee to agree on "additional activities." An eligible employee may take FMLA leave while the employee's spouse, son, daughter or parent (the "covered military member") is on active duty or called to active duty for one or more of the following qualifying exigencies:

1. **Short-notice deployment:** to address any issues that arise from the fact that a covered military member is notified of an impending call or order to active duty seven or less calendar days prior to the date of the deployment. Leave taken for this purpose can be used for a period of seven calendar days beginning on the date a covered military member is notified of an impending call or order to active duty.
2. **Military events and related activities:** to attend any official ceremony, program or event sponsored by the military that is related to the active duty or call to active duty status of a covered military member and to attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations or the American Red Cross.
3. **Childcare and school activities:** to arrange for childcare, to provide childcare to a covered military member's child on an urgent, immediate need basis, to enroll in or transfer to a new school or day care facility or to attend meetings with staff at a school or a day care facility.
4. **Financial and legal arrangements:** to make or update financial or legal arrangements to address the covered military member's absence while on active duty or call to active duty status, and to act as the covered military member's representative before a federal, state or local agency for purposes of obtaining, arranging or appealing military service benefits while the covered military member is on active duty or call to active duty status, and for a period of 90 days following the termination of the covered military members' active duty status.
5. **Counseling:** to attend counseling for the covered military member or his or her child, provided that the need for counseling arises from the active duty call or call to active duty status of a covered military member.
6. **Rest and recuperation:** to spend time with a covered military member who is on short-term, temporary, rest and recuperation leave during the period of deployment. Eligible employees may take up to five days of leave for each instance of rest and recuperation. Some states, including California, have similar military family leave laws already in effect.

7. **Post-deployment activities:** to attend arrival ceremonies, reintegration briefings and events and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the covered military member's active duty status and to address issues that arise from the death of a covered military member while on active duty status, such as meeting and recovering the body of the covered military member and making funeral arrangements.
8. **Additional activities:** to address other events that arise out of the covered military member's active duty or call to active duty status provided that the employer and employee agree that such leave will qualify as an exigency and agree to both the timing and duration of such leave.

Notice of Leave

An employee is required to give notice to his or her employer of the need for FMLA leave, but he or she is not required to expressly assert rights under the FMLA or even mention the FMLA. Employers are required to document any discussion with an employee in which there is a dispute about whether the request qualifies as one under the FMLA. Eligible employees may also take FMLA leave on an intermittent or reduced schedule basis when necessary because of a qualifying exigency.

Certification of Qualifying Exigency Leave

The first time an employee requests leave because of a qualifying exigency, an employer may require the employee to provide a copy of the covered military member's active duty orders or other documentation issued by the military that indicates that the covered military member is on active duty or call to active duty status, and the dates of the covered military member's active duty service. An employee is only required to provide this information once. If the need to take such leave arises out of a different period of active duty or call to active duty status for the same covered servicemember, or is for a different covered servicemember, the employer may request a copy of new orders or other military documentation.

An employer may require that leave for any qualifying exigency be supported by a certification from the employee. Employers may use the DOL's new optional form (Form WH-384) or require a certification that sets forth the following information: (a) statement of appropriate facts regarding the qualifying exigency for which FMLA is being requested; (b) the approximate date upon which the qualifying exigency commenced or will commence; (c) for a single, continuous period of leave, the beginning and end dates for such absence; (d) for intermittent or reduced schedule basis leave, an estimate of the frequency and duration of the qualifying exigency; and (e) if the qualifying exigency involves meeting with a third party, appropriate contact information for the individual or entity with whom the employee is meeting and a brief description of the purpose of the meeting.

An employer must provide written notice of the requirement for certification each time a certification is required. In most cases, the employer should request that an employee furnish certification at the time the employee provides notice of the need for leave or within five business days thereafter, or in the case of unforeseen leave, within five business days after the leave commences. If, later, the employer has reason to question the appropriateness of the leave or its duration, it may request certification then. The employee must provide the requested certification to the employer within 15 calendar days after the employer's request.

Verifying a Qualifying Exigency

The DOL allows the employer to verify the employee's explanation only when the employee has failed to provide the employer with the required certification or the employee's reason involves a meeting with a third party. If the qualifying exigency involves meeting with a third party, the employer may contact the individual or entity with whom the employee is meeting for purposes of verifying the meeting. The employee's permission is not required to verify meetings or appointments with third parties, but no additional information may be requested by the employer. An employer also may contact an appropriate unit of the Department of Defense to request verification that a covered military member is on active duty or call to active duty status without the employee's permission, but an employer may not seek additional information.

Conclusion

The final FMLA regulations provide highly anticipated guidance on the two new qualifying reasons for FMLA leave related to military servicemembers and their families. Employers should review and update their policies to ensure that they properly reflect the rights and obligations outlined by the final regulations, which become effective January 16, 2009. Moreover, while military caregiver leave has been available to employees since January 2008, employers must grant leave for a qualifying exigency beginning January 16, 2009. Employers with questions on responding to requests for military-related FMLA leave or revising employment policies and applying them uniformly should consult with experienced employment counsel.

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