



# LEGAL TOPICS

## DEPARTMENT OF LABOR’S NEW FAMILY MEDICAL LEAVE ACT REGULATIONS

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On November 17, 2008, the Department of Labor (“DOL”) issued new regulations regarding the Family Medical Leave Act (“FMLA”). The regulations will significantly affect all employers subject to the FMLA, including all private employers with 50 or more employees, all public employers, and all public and private elementary and secondary schools. These new regulations become effective soon—January 16, 2009.

### Why Did the Department of Labor Issue New Regulations?

The reasons for the new regulations are basically threefold. First, in January of 2008, the National Defense Authorization Act (“NDAA”) made significant changes to the FMLA. Under the NDAA, employees may take FMLA leave for military caregiving and for “any qualifying exigency” arising out of the fact that an employee’s spouse, son, daughter, or parent has been called to active military duty. The NDAA specifically ordered the DOL to issue new regulations regarding these provisions. Second, the DOL revised the regulations to conform to decisions by the United States Supreme Court and to address other relevant federal court decisions. Third, based on its experiences with the FMLA over the last fifteen years, the DOL believed the regulations could be improved. Note that, in many instances, the DOL has “improved” the regulations by reorganizing them. Therefore, if you are familiar with the FMLA regulations that have been in effect since 1995, beware that the same information may now be found in a completely new section of the regulations.

### Qualifying Exigency Leave

As mentioned above, under the NDAA, eligible employees may now take up to 12 weeks of job-protected, unpaid leave in a 12-month period because of “any qualifying exigency” arising out of the fact that an employee’s spouse, son, daughter, or parent is or has been notified of an impending

call to active duty in support of a contingency military operation.

The regulations set forth the rules for this new type of FMLA leave.

### Application

First, the new regulations make clear that this type of leave only applies when a member of the National Guard, Reserves, or retired military has been called to active duty in support of a federal contingency military operation. It does not apply to current, full-time members of the Armed Forces. Therefore, if an employee is seeking leave to be with her son, a full-time Marine who is being deployed overseas, the FMLA will not apply. On the other hand, if the son who is being deployed is a member of the Air National Guard, the FMLA may apply.

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As the DOL explained, “In the case of Reservists and the National Guard, those individuals may work elsewhere, but are willing to serve the Federal government if necessary and are willing to allow their lives to be disrupted by a call to active duty. . . . It is the unexpected disruption to their lives that appears to be the focus of exigency leave.”

## Types of Qualifying Exigencies

Next, the regulations identify eight types of “qualifying exigencies”: (1) short-notice deployment; (2) military events and related activities; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities; and (8) a catch-all category, to address events which may arise out of the active duty, if the employer and employee agree to the leave. Some additional qualifications to these categories of leave exist. For example, leave for a “short-notice” deployment may last no longer than seven calendar days. Additionally, “rest and recuperation” leave, or time to spend with a covered servicemember who is on a short-term leave during the deployment, is limited to five days.

## Certification

Employers can verify a call to active duty and require employees to “certify” their need for qualifying exigency leave. For example, employees may be required to provide a copy of the covered servicemember’s active duty orders. Also, employers can require employees to provide a statement, signed by the employee, setting forth appropriate facts supporting the request for leave. As another example, if the employee is seeking leave for a meeting or appointment with a third party, employers may request contact information so the meeting may be verified. The DOL also has created a new, optional certification form (WH-384) employers may use to gather this information.

## Intermittent and Reduced Leave

Note that this leave can be taken intermittently or on a reduced leave schedule. Unlike intermittent or reduced leave for planned medical treatment, however, employees are under no obligation to schedule such leave so as to avoid unduly disrupting an employer’s operations, nor may the employee be transferred to an alternative position during such leave.

## **Military Caregiver Leave**

Under the NDAA, employees who are otherwise eligible for FMLA leave can take FMLA leave for military caregiving. More specifically, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember can take up to **26 weeks** of job-protected, unpaid leave in a single 12-month period to care for the servicemember if the servicemember is recovering from a “serious injury or illness sustained in the line of active duty.”

The new regulations define these key terms and set out the rules for this new type of FMLA leave.

## Application

Military caregiving leave only applies to eligible employees seeking to care for current members of the Armed Forces, National Guard, Reserves, or members of such organizations who are on the temporary disability retired list. Eligible employees may not take FMLA leave to care for former members of the military (or National Guard or Reserves), or members on the permanent disability retired list. The practical effect of this rule is that employees cannot take FMLA leave to care for a servicemember who was injured long ago.

## Serious Illness or Injury Sustained in the Line of Duty

Unlike other types of FMLA medical leave, which involve a “serious health condition,” military caregiver leave involves something different: a “serious illness or injury sustained in the line of active duty.” This phrase is defined in the new regulations as an injury or illness incurred in the line of active duty that “may render the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating.”

Similar to the certification process for other types of FMLA leave related to a medical condition, employers may require employees to provide a medical certification that a covered servicemember suffers from the requisite “serious illness or injury.” Because non-military health care providers may not be informed about the job duties at issue, the certification must come from a health care provider who is capable of making the needed assessment, such as a United States Department of Defense health care provider, or a United

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States Department of Veterans Affairs health care provider. The DOL also has created a new, optional certification form (WH-385) employers may use for this purpose.

## Calculation and Amount of Leave

The calculation of the amount of military caregiver leave is completely different from the calculation of other types of FMLA leave:

First, employees get 26 weeks of leave, not 12.

Second, the leave is granted on a one-time, per injury, per covered servicemember basis. It is not recurring. In other words, if a covered servicemember is injured, an employee only may take military caregiving leave once, even if the servicemember's condition does not improve. The only way an employee can take this type of leave more than once is if the servicemember suffers an additional, separate injury or illness, or a completely different servicemember is involved.

Third, the single 12-month period described in the NDAA begins the first date an eligible employee takes FMLA leave to care for a covered servicemember, and ends 12 months after that date, regardless of the method the employer normally uses to determine an employee's 12 workweeks of FMLA leave.

Additionally, if leave qualifies as military caregiver leave and another type of leave allowed by the FMLA (such as, for example, FMLA leave to care for an immediate family member who has a serious health condition), the employer must designate such leave as military caregiver leave in the first instance. After such leave is exhausted, other types of FMLA leave may apply. Note, however, that the total amount of FMLA leave an employee may take in the "single 12-month period" is 26 weeks, even if other types of FMLA leave apply. The practical effect of these provisions is that FMLA leave may be very difficult to calculate when military caregiver leave intersects with other types of FMLA leave.

## Intermittent and Reduced Leave

Also, similar to other types of FMLA medical leave, military caregiver leave can be taken intermittently or on a reduced leave schedule when medically necessary.

## Next of Kin

A new relationship has been identified as eligible for leave: "next of kin." The new regulations define "next of kin of a covered servicemember" as the servicemember's nearest blood relative other than spouse, parent, or child, in the following order of priority: (1) blood relatives who have been granted legal custody of the covered servicemember by court order or statute; (2) siblings; (3) grandparents; (4) aunts and uncles; and (5) first cousins. These rules apply unless the servicemember has specifically designated another blood relative in writing to be his or her nearest blood relative for purposes of military caregiver leave. If no such designation has been made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members are considered the "next of kin" and may take FMLA leave, either consecutively or simultaneously.

## **Notice Requirements**

In addition to the provisions regarding the new types of leave created by the NDAA, a key focus of the new regulations is notice. The DOL wants employers to do a better job of providing employees with notice of their FMLA rights, and wants employees to do a better job of informing employers of their need for FMLA leave. Accordingly, the DOL has revised the notice requirements. Highlights of these changes are:

- The DOL has issued three new optional forms employers may use to satisfy all of the notice requirements.
- If an employer is covered by the FMLA but does not have an employee handbook or similar written materials describing employee benefits or leave rights, a general notice of FMLA rights must be distributed to each new employee upon hiring.
- After an employee requests FMLA leave, or an employer gains knowledge that an employee's leave may be FMLA qualifying, an employer now has five business days, rather than two, to inform the employee of his or her eligibility for FMLA leave.
- If an employer determines an employee is not eligible for FMLA leave, the employer must give the employee at least one reason why the employee is not eligible.
- After receiving enough information to determine whether leave is FMLA-qualifying (such as, after receiving a completed medical certification), employers now get five business days, instead of two, to designate the leave as FMLA leave or not.

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- The FMLA designation notice must state how much leave will be counted as FMLA leave and any requirement to provide a fitness for duty certification.
- The new regulations clarify an employee's existing obligations to provide advance notice of FMLA leave, and state that if an employee does not give the requisite notice, he or she may be required to explain why. Also, the regulations emphasize that unless the employee has a good reason, an employee must follow an employer's usual and customary procedures for reporting an absence. FMLA leave is not a "free pass" to ignore the employer's procedures.

## Medical Certifications, Fitness for Duty Certifications, and an Important New Opportunity for Employers

The DOL has created two new optional medical certification forms—one to be used for an employee's own serious health condition, and one to be used for a serious health condition of an employee's immediate family member (WH-380-E and WH-380-F).

The new regulations also now provide an important, new opportunity for employers: in order to guide a health care provider's assessment of an employee's ability to perform his or her job, employers may list the essential functions of the employee's position on the certification to be completed by the health care provider. In fact, the DOL "strongly encourages employers to provide a list of essential functions when it requests medical certification." If employers do not, a health care provider will take the employee's word as to what his or her essential job functions are.

Employers are given the same new opportunity with fitness for duty certifications. If an employer wants a fitness for duty certification to address an employee's ability to perform the essential functions of the employee's position, the designation notice must say so, and must list the employee's essential job functions. Taking advantage of this opportunity will make fitness for duty certifications much more meaningful for employers.

Another important change has been made regarding fitness for duty certifications. Previously, an employer could not request a fitness for duty certification for an employee who

had taken intermittent FMLA leave for his or her own serious medical condition. Now, such a certification can be required once every 30 days in such situations if "reasonable safety concerns exist regarding the employee's ability to perform his or her duties."

Changes also have been made to the process for clarifying a medical certification. If an employer believes the certification is deficient, the employer must give the employee written notice of the nature of the deficiency and seven calendar days to cure it. If the employee does not, the employer now has more leeway than before. Under the existing regulations, only a *health care provider* could directly communicate with the employee's health care provider about a certification. Now, a *human resources professional, a health care provider, a leave administrator, or a management official* can directly contact the employee's health care provider for clarification. In no circumstances, however, can the employee's direct supervisor contact the health care provider.

## Revised Definition of Serious Health Condition

In the new regulations, the DOL has revised some aspects of the definition of a "serious health condition." The definition never has been simple, and the new regulations do not change this fact. The regulations do, however, arguably make at least some aspects of the definition more employer-friendly. Now, a serious health condition is defined to include a period of incapacity of three or more full calendar days, if: (1) the individual sees a health care provider in person within seven days of the first day of incapacity; and (2) either (a) is treated a second time in person by a health care provider within 30 days of the first day of incapacity (absent extenuating circumstances) or (b) is given a regimen of continuing treatment. Additionally, the definition of a serious health condition relating to chronic conditions has been revised. Now, a chronic condition must require at least two visits to a health care provider per year in order to be considered a serious health condition.

## Beware: Revised Definition of Eligible Employees

In order to be eligible for FMLA leave, an employee must have been employed by the employer at issue for at least 12 months. Some federal cases suggested that, under the

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existing regulations, the 12-month period did not need to be consecutive. The DOL has clarified this issue in a very employee-friendly manner. Now, the regulations make clear that the 12 months of employment do not need to be consecutive, and employers must look over their employment records over a seven-year period to determine FMLA eligibility. If you frequently rehire former employees, beware of this new provision.

## Increments of Intermittent Leave Revised

Under the existing regulations, when an employee took FMLA leave on an intermittent or reduced leave basis, employers were required to account for the leave using the smallest increment of time the employer's payroll system recognized. Because some employers have sophisticated time-keeping abilities, the result was that such employers were required to account for FMLA leave in increments as short as a minute. Now, the rule has changed—employers only are required to account for FMLA leave using the shortest period of time the employer uses to account for other forms of leave, so long as the time increment is not more than an hour.

## Beware: Light Duty

Employers who regularly provide light duty work beware: the new regulations expressly provide that time an employee spends doing light duty work does not count against an employee's FMLA leave entitlement. Furthermore, an employee does not waive his or her right to job restoration while working the light duty assignment.

## Substitution of Paid Leave – Employer-Friendly Change

The concept of the substitution of *paid* leave for *unpaid* FMLA leave always has been complicated. The existing regulations further complicated the issue by treating medical leave differently from family leave, and by treating sick and medical leave differently from vacation or personal leave. Additionally, under the existing regulations, if an employer's requirements for using paid leave were more stringent than the requirements for taking FMLA leave, the least stringent requirements had to apply.

These rules have changed. Now, all paid time off is treated the same, and employers can apply their usual rules for paid leave to employees on FMLA leave. If an employee seeking FMLA leave does not comply with the requirements of an employer's paid leave policy, the leave still can be FMLA leave, but it will not be paid.

The DOL gives the following example: An employer requires paid sick leave to be taken in full day increments. An employee needs to take only two hours of FMLA leave. Under the new regulations, the employee has two choices: 1) take two hours of FMLA leave, unpaid; or 2) take a full day of paid FMLA leave.

The new regulations also allow public employers to use (paid) compensatory time off concurrently with (unpaid) FMLA leave.

## Bonuses

Before, employees who were absent for FMLA leave still had to be paid "perfect attendance" bonuses. The new regulations change this rule. Now, if a bonus or other payment is based on the achievement of a specified goal, such as hours worked, products sold, or perfect attendance, and an employee fails to meet the requirements because of FMLA leave, the employee does not need to be paid the bonus.

## Waivers

In the last several years, some federal courts (including the Fourth Circuit Court of Appeals) interpreted the existing FMLA regulations to mean that an employee could not waive or release his or her FMLA rights unless the DOL or a federal court approved the waiver. These court decisions made it very difficult to settle FMLA lawsuits and claims. The new regulations make clear that permission from the DOL or a federal court is not required in order to resolve such claims.

Instead, releases and waivers only are prohibited in advance of disputed claims (for example, employers cannot require employees to waive their FMLA rights as a condition of employment).

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## Steps You Should Take

In short, the new regulations will significantly affect employers subject to the FMLA. If the FMLA applies to you, these are the practical steps you should take:

- The FMLA policy in your employee handbook probably needs to be reviewed and revised. The policy now should include military caregiver and qualifying exigency leave. Also, your policy should be reviewed to make sure it complies with all of the new rules.
- Make sure your FMLA poster is current.
- Note that all of the DOL's FMLA forms have changed. If you use any of the current DOL forms (such as the Employer Response to Employee Request for FMLA Leave, Certification of Health Care Provider, or the DOL's notice of FMLA rights), you should now use the new forms. These forms can be downloaded at [www.dol.gov/esa/whd/fmla/finalrule.htm](http://www.dol.gov/esa/whd/fmla/finalrule.htm).
- As explained above, the new regulations specifically allow employers to give a list of essential job functions to health care providers for purposes of medical certifications and fitness for duty certifications. This is a great opportunity for you to get accurate information about an employee's need for leave and readiness to return from leave. If you want to take advantage of this opportunity, it will be even more important that your existing job descriptions are current and up to date. If you

do not have job descriptions, you will need to take steps to insure that information relating to job duties provided on FMLA paperwork is consistent and accurate.

- Your procedural requirements for requesting leave and reporting absences should be reviewed and potentially revised. Now, the DOL seems more willing to hold employees accountable if they do not use an employer's reasonable procedural requirements for leave and notification of absences. Your procedural requirements should therefore be reviewed with this in mind.
- Make sure the individual or individuals in your organization responsible for FMLA compliance are aware of, and learn, the new rules and regulations. A lot has changed.
- Educate your front-line managers about the FMLA military caregiver and qualified exigency leave because these are the individuals most likely to receive such leave requests in the first instance.

If you have any questions about this client advisory or if you have any questions about how the new regulations will affect you, please contact Elizabeth V. LaFollette at (336) 271-2572, Patricia Goodson at (919) 573-6242, Nicole Crawford at (336) 271-3140, or one of the other Brooks Pierce employment attorneys listed on our firm's website.

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