



SPECIAL Alert

In This Issue

In this ninth Special Alert for 2009, we discuss clarifications recently made to the Family Medical Leave Act (FMLA). President Obama recently signed the National Defense Authorization Act for Fiscal Year 2010 into law. A section of this primarily defense-related legislation includes FMLA clarifications.

The clarifications refer to the new rights offered to service members under the FMLA and also the extended leave available for service persons who incur any illness or injury and need assistance from a qualified family member.

We welcome your comments and suggestions regarding this issue of our Special Alert. For more information on this article, please contact your Account Manager or visit the McGrawWentworth web site at

“Family Medical Leave Act (FMLA) Changes”

President Obama recently signed into law a piece of legislation that generally addressed defense issues related to our country. The National Defense Authorization Act for Fiscal Year 2010 included a section that made a few changes to the Family Medical Leave Act (FMLA). The changes are really clarifications related to the FMLA expansions introduced by the National Defense Authorization Act of 2008.

This Special Alert will:

- Review the changes made to the FMLA in 2008.
- Overview the clarifications made by the National Defense Authorization Act for Fiscal Year 2010.
- Provide action steps to help your organization integrate the clarifications.

Fortunately, not many employers have been affected by the expansion of rights related to service members. However, you will need to modify your FMLA policies to reflect the new clarifications.

Review of Service Members Expanded Rights

On January 28, 2008, President Bush signed into law the National Defense Authorization Act which included an expansion of FMLA rights in regard to individuals serving in the Armed Forces. Two new rights created for service members are as follows:



1. **Added a new FMLA qualifying event:** Employees are eligible to take up to 12 weeks leave for any “qualifying exigency” that may be related to the fact a spouse, son, daughter or parent is called to active duty. Final FMLA regulations released at a later date included more details on events that were considered qualifying exigencies. Qualifying exigencies can include the following situations:

“qualifying exigency” that may be related to the fact a spouse, son, daughter or parent is called to active duty. Final FMLA regulations released at a later date included more details on events that were considered qualifying exigencies. Qualifying exigencies can include the following situations:

- **Short-Notice Deployment:** Leave is permitted to address any issue that arises as the result of a covered military member being called to active duty in support of a contingency operation with seven or less calendar days prior to deployment. Leave

taken can be taken for up to 7 days under these circumstances.

- **Military Events and Related Activities:** To attend any official military function related to active duty or a call to active duty. This includes family support sessions or informational briefings for the family.
- **Child Care and School Activities:** FMLA time off needs to be provided when a call to active duty impacts childcare and alternative child care needs to be arranged or new schools need to be considered. Time off also needs to be granted for parent teacher conferences, disciplinary issues or so on.
- **Financial and legal arrangements:** Time off needs to be granted to update financial or legal arrangements that need to be addressed when the covered military members are on duty or called to duty.
- **Counseling:** Time off for any family member to attend counseling sessions provided by someone other than a medical provider, as long as the need arises from active duty or a call to active duty.



- **Rest and Recuperation:** Eligible employees may take up to 5 days of leave to spend time with a covered military member who is on a short-term, temporary rest and recuperation leave.

- **Post-Deployment Activities:** Time off needed to attend arrival ceremonies or any other official ceremony sponsored by the military for up to 90 days following the termination of active duty status. This includes time off needed if

a covered service member dies while on active duty; time needed to recover the body, meet with military officials and

plan a funeral is considered inclusive of post-deployment activities.

- **Miscellaneous Activities:** Any other activities not specified above that the employee and the employer agree are needed and qualify as an exigency. The employee and employer must agree on timing and duration of the leave.

A call to active duty is defined by the regulations as a call or order to active duty in support of a contingency operation pursuant to all section of the United States Code which can call reserve units and retired personnel back to active duty. There are a host of code sections that apply to different branches of the military and they are all spelled out in the final FMLA regulations issued in 2008.

An employer can require the employee provide a copy of the covered military member's active duty orders or any documentation issued by the military which confirms the call to active duty in a contingency operation. The employer can also verify the facts surrounding a qualifying exigency. For example, if the time off is needed to attend a military event, the employer can verify the event is taking place at the indicated time.

2. **Offered up to twenty-six weeks of extended FMLA leave time for the care of a service person.** A number of clarifications relating to this extended leave were included in the Final FMLA regulations. Key provisions for this extended leave include:

- Family members are entitled to the extended leave for a current member of the armed forces or a reserve unit who incurs a serious illness or injury while on active duty for which ongoing medical treatment, recuperation or therapy is needed; or if the illness or injury qualifies the member to be placed on the temporary disabled list:
 - A serious injury or illness means an injury or illness incurred by a covered service member in the line of active duty that would render the service member medically unfit to perform the duties of his or her office, grade, rank or rating.

- Medical treatment can be provided by military treatment facilities.
- This leave is not available for **former members** of the armed forces, the National Guard or the Reserves or any military members placed on the permanently disabled retired list.
- In order to qualify for the extended leave to provide care for the military member, the employee must be the spouse, son, daughter, parent, or next of kin. In some situations, blood relatives may be granted legal custody of the service member by a court decree. If this designation is made, the designated individual is considered the only next of kin for these purposes.
- An eligible employee under these circumstances is entitled to 26 work-weeks of leave to care for a covered service member in a "single 12 month period". The single 12 month period begins on the first day the eligible employee takes leave to care for the service member and ends 12 months after that date. This measurement is used regardless of how an employer measures their leave year. In addition, the 26 weeks must be used in that 12 month period or the remainder of any leave is forfeited.
- This extended leave requirement is a per-covered-service member, per injury basis. The

employee can take more than one period of 26 weeks of leave if the leave is to cover a different service member or a different unrelated illness or injury. However, no more than 26 weeks can be taken in one single 12 month period regardless of the circumstances.

- If this situation applies and the employee has a different reason for taking an FMLA leave during a single 12 month period, the employee may take no more than 12 weeks for another other qualified reason and no more than 26 weeks in total.
- If a husband and wife are employed by the same employer, they are limited to 26 weeks in total to care for a covered service member.

If an employee is requesting time off to care for an ill or injured service member, the employer can request certification of the serious illness or injury. The DOL has developed a model form that employers can use for this purpose, called WH-385. Employers are required to accept Invitational Travel Orders or International Travel Authorization in lieu of the form. These travel vouchers are issued to a family member to join injured or ill service members wherever they are receiving treatment. If an employee wants to continue to care for the service member beyond the expiration date of the travel voucher then the employer can request the certification form be completed. For



this leave type only, the employer cannot request second or third opinions. Recertifications also cannot be requested for this type of leave.

These changes were made just a couple of years ago and many employers amended their FMLA policies and procedures to accommodate these new rules.

Overview of the Recent Clarifications

The new regulations did not change the key parameters of the FMLA benefits. They did however provide a number of clarifications.

First, they introduced a new term, "covered active duty". Covered active duty replaces the original term of active duty. Covered active duty for members of a regular component of the Armed Forces means duty during deployment to a foreign country. For members of the reserve

components of the Armed Forces, covered active duty means duty during deployment to a foreign country under a call or order to active duty pursuant to specified

provisions in Federal law. The definition was added to limit the scope of when FMLA can be used for qualifying exigencies. An employee's entitlement to a qualifying exigency leave requires the employee's spouse, son, daughter or parent be on "covered active duty" in the Armed Forces (or have been notified of an impending call or order to such duty).

The new regulations also provided more details to assist with administering an extended leave due to the illness or injury of a service member. The clarifications actually expand the situations that may qualify for this extended leave:

- An employee's entitlement to the expanded leave can apply when the qualifying family member (spouse, son, daughter, parent or next of kin) of a veteran who is undergoing medical treatment, recuperation, or therapy for a serious illness or injury and who was a member of the armed forces (including National Guard and Reserves) at any time during the five year period preceding the date of the treatment. The new regulations place a five year window on when treatment can be received and still qualify for the FMLA leave. Which makes sense because in some situations, especially post-traumatic stress situa-



tions, there can be a delay in the onset of the illness.

- In addition, the leave must be needed for a serious illness or injury related to covered active duty.
- The new rules also specified in the definition of a qualifying serious illness or injury that in situations where the illness or injury existed prior to active duty but the condition was aggravated by active duty, this situation would qualify for the extended leave.

It is important to note that these clarifications allow the extended leave to be available for service members affected by an illness or injury while actively serving and also for veterans who are not actively serving but whose illness or injury was incurred during covered active duty within a five year window allowed for treatment.

These changes do not affect any of the material provisions of the FMLA, but your organization will need to review your FMLA documents and expand the definitions of these situations.

Action Steps

This legislation does not specify an effective date for these clarifications. However, when the government views legislation as more of a clarification than a material change, typically those changes should be adopted immediately.

Your organization needs to review your FMLA policies and procedures as they relate to service members. Several definitions will need to be updated. In addition, you will need to make sure your administrative process is updated to reflect these clarifications as well.

If you have any questions, please contact your McGraw Wentworth Account Manager. **MW**

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