



Military Family Leave Questions

February 2008

On January 28, 2008, the National Defense Authorization Act for Fiscal Year 2008 was passed, amending the Family and Medical Leave Act (FMLA) to provide two additional leave categories for family members of servicemembers. The statute required the Department of Labor (DOL) to issue regulations implementing the new leave provisions, and the DOL began work on these regulations even before the statute was passed. Because of the need to issue regulations as soon as possible, the DOL is seeking comment in response to several questions it has raised with regard to these regulations. It raised these questions as part of its Notice of Proposed Rulemaking on the FMLA, published in the Federal Register on February 11, 2008. Once it considers comments received in response to the Notice, it will issue final regulations, skipping the step of issuing proposed regulations and allowing a comment period. Therefore, employers who wish to comment on these issues must do so on or before April 11, 2008.

The DOL has asked employers to comment on any aspect of this new law that would be addressed in the regulations. It has also posed a series of specific questions, some of which are summarized below:

- **General Questions:** Should the regulations regarding the new military family leave entitlements be incorporated into the proposed new FMLA regulatory scheme, or should separate stand-alone regulatory provisions be created for the military family leave entitlements? Should the DOL's FMLA poster include the military family requirements, or should the DOL create a separate poster for military family leave?
- **Definitions:** How should the DOL define "next of kin?" Should the definition of "son or daughter" be different from the definition in the rest of the FMLA? How should the DOL define a "qualifying exigency?" How should the DOL measure the "single 12-month period" during which a family member can take a leave to care for a covered servicemember?
- **Timing of Leaves:** For leave taken to care for a covered servicemember, should the DOL require that the leave be taken within a certain time period of the injury? How should they treat requests for leave to care for a servicemember who was injured during active duty, but whose injuries do not manifest until the servicemember has left active duty?
- **Certifications—Leave to care for covered servicemember:** Should a certification from the Department of Defense or Veterans Affairs be sufficient to establish whether a servicemember incurred the injury in the line of duty while on active duty status or whether the servicemember is medically unfit for duty? What is the appropriate certification requirement for military caregiver leave? What should the timing requirements be for obtaining such a certification? Should the second and third opinion certification requirements be the same as for other FMLA leaves?
- **Certifications—Leave for qualifying exigency:** What type of information should be provided in order for it to be considered sufficient? Who may issue a certification related to active duty or call to active duty status? Should the employee also have to provide a certification that the leave is due to a qualifying exigency? What should the timing requirements be for these certifications? Who should bear the costs of obtaining these certifications? Should an employer be allowed to clarify, authenticate or validate these certifications? Should there be a recertification process?

- **Leave Entitlement:** Is the 26-workweek leave entitlement to care for a covered servicemember a one-time entitlement, or may an employee have multiple entitlements?
- **Dual-Qualifying Leaves:** When a leave to care for a covered servicemember also qualifies as leave to care for a spouse, parent or child with a serious health condition, how should that leave be designated? Can the type of leave it is designated as be changed retroactively in any circumstances?
- **Intermittent and Reduced Leave Schedules:** For intermittent leave and reduced leave schedules, should the regulations provide for temporary transfers to available alternative positions that better accommodate the leave for leaves taken for a qualifying exigency?
- **Employee Notice:** Should leave to care for a covered servicemember be incorporated into the new proposed notice provisions? If not, what type of notice should be required for this type of leave? What type of information should an employee provide to the employer for the notice to be sufficient to make the employer aware that the need for leave is FMLA-qualifying?
- **Spouses Employed by Same Employer:** How should the DOL incorporate the same employer limitation provisions into the existing regulatory scheme for other FMLA leaves? How would this be done if there is a different 12-month period definition for leaves to take care of a covered servicemember?
- **Health Benefits:** May an employer recover premiums paid when an employee fails to return to work because of the continuation, recurrence or onset of a serious injury or illness of the covered servicemember?

A full copy of the Notice of Proposed Rulemaking, complete with the military family leave questions can be found at the following link:

<http://www.dol.gov/esa/whd/fmla/FedRegNPRM.pdf>