



## Family and Medical Leave Act Changes, Part I: Military Family Leave Regulations

December 2008

The Family and Medical Leave Act (FMLA) has undergone significant changes in the last year. In January, FMLA was expanded to include new leave categories for families of military service members. Then in March, the U.S. Department of Labor (DOL) proposed new regulations to clarify the law concerning non-military FMLA leaves. Finally, the DOL capped off this year of FMLA changes by issuing final regulations, guiding employers on the management of all types of FMLA leaves. Because of the scope of these new regulations, this *Briefing* will be in two parts. This Part I focuses on the military family leave regulations. Part II will summarize the finalized non-military FMLA provisions. Whereas the new changes involve numerous components, these two *Briefings* will address the highlights. Further guidance may be provided in the coming year to address additional questions or issues that may arise, as these changes are implemented.

### Previous ICS *Briefing* on FMLA, Military Family Leave Questions:

[http://www.innovativecaresystems.com/press/0226\\_mleave.pdf](http://www.innovativecaresystems.com/press/0226_mleave.pdf)

### Previous ICS *Briefing* on FMLA, New Regulations Summary:

[http://www.innovativecaresystems.com/press/0307\\_fmla.pdf](http://www.innovativecaresystems.com/press/0307_fmla.pdf)

Currently there are two categories of FMLA leave for servicemember families. “Servicemember family leave” provides an eligible employee who is the spouse, child, parent or next of kin of a covered servicemember, up to 26 workweeks of leave in a 12-month period in order to assist with the care for that covered servicemember. “Qualifying exigency leave” allows the spouse, parent or child of an active duty service member to take 12 weeks of leave because of a qualifying exigency.

As a general matter, the DOL conformed the procedures for taking military leave to the procedures used for taking other types of FMLA leaves wherever applicable and appropriate. This approach is intended to make the process easier for both employers and employees. Additionally, the DOL clarified a number of issues from the January legislation that were unclear, and addressed employee and employer responsibilities specific to military FMLA leave.

### Qualifying Exigency Leave

For qualifying exigency leave, the new regulations define a “qualifying exigency” to include the following events, when they arise out of the call to active duty status of a reservist or National Guard member.

- Short-notice deployment—notice seven or less calendar days prior to deployment. This type of leave can be used for a period of seven days, beginning on the date the military member is notified of the impending call to active duty.
- Military events—to attend official events sponsored by the military that are related to active duty or call to active duty status.
- Childcare and school activities—to care for a child on an urgent basis; to arrange for alternative childcare/schooling when the call to active duty necessitates a change in childcare arrangements; to attend meetings with school/daycare personnel.

- Financial and legal arrangements—to make or update arrangements to address the covered military member’s absence or to act as the covered military member’s representative before governmental agencies for the purpose of dealing with military service benefits.
- Counseling.
- Rest and recuperation—to spend time with a covered military member who is on short-term rest and recuperation leave during the period of deployment.
- Post-deployment activities—to attend official ceremonies or programs sponsored by the military in the first 90 days following termination of a covered military member’s active duty status, or to address issues that arise from the death of the covered military member.

The definition of a qualifying exigency also includes a catch-all category of “additional activities that are agreed to by the employer and employee.” This last category of qualifying exigency will require an employer to engage in a discussion with an employee seeking protected leave when an event does not fall into one of the identified qualifying exigency categories. The employer and employee must agree as to both the timing and the duration of the leave, as well as the fact that the leave qualifies as an exigency. Additional guidance on this category would be helpful, but has not been provided in the regulations.

### **Servicemember Family Leave**

The second new category of military FMLA leave is servicemember family leave. For servicemember family leave, the law allows an eligible employee to take 26 workweeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness. The new regulations revolve around how the 26 workweeks and 12-month period are calculated.

The regulations clarify that the single 12-month period begins on the first day the eligible employee takes FMLA leave to care for a servicemember, 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. A qualifying employee is entitled to a combined total of 26 workweeks of leave for any FMLA-qualifying reason during this single 12-month period. This means that if an employee takes 12 weeks of leave to care for a newborn child, then two months later takes FMLA leave to care for an injured servicemember spouse, the employee will only have 14 weeks of protected leave remaining to care for the injured spouse.

The regulations also clarify that if an eligible employee does not take all 26 weeks of leave to care for an injured servicemember during the 12-month period, the remaining leave time is forfeited. Therefore, if an employee takes 8 weeks of leave to care for an injured servicemember, the employee only has until the end of the 12-month period to take the remaining 18 weeks of leave, if needed to care for that injured servicemember.

The leave entitlement to care for an injured servicemember is on a per-covered-servicemember, per-injury basis. Therefore, an eligible employee may be entitled to take more than one 26-workweek period of leave, if it is either to care for more than one covered servicemember, or to care for the same covered servicemember with a subsequent illness or injury. Under those circumstances, the employee is still only eligible to take 26 workweeks of leave during each 12-month period.

## Notice for Military Family Leaves

The regulations provide that notice must be provided “as soon as practicable”, for any foreseeable leave for a qualifying exigency, regardless of how far in the future the leave is expected. The regulations define “as soon as practicable” as “as soon as both possible and practical, taking into account all of the facts and circumstances of the individual case.” Otherwise, the military family leave notice provisions are the same as those for other types of FMLA leaves.

## Certification for Military Family Leaves

Qualifying Exigency-- For leaves taken because of a qualifying exigency, the 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 which indicates that the covered military member is on active duty or call to active duty status in support of a contingency operation and the dates of service. The regulations only require an employee to produce such proof the first time the employee requests leave. An employer may ask for new active duty orders or other documentation for a subsequent leave, due either to an active duty call of a different family member, or a subsequent active duty call for the same family member.

The regulations also provide that an employer may require that the employee support the need for leave with a certification that sets forth:

- the appropriate facts concerning the need for the leave (along with supporting documentation);
- the approximate date on which the qualifying exigency began;
- the beginning and end dates of the leave, an estimate of the frequency and duration of the qualifying exigency;
- if leave is sought on an intermittent or reduced schedule basis; and/or
- if the need for leave involves meeting with a third party, appropriate contact information for that person, and a description of the purpose of the meeting.

If the employee submits a complete and sufficient certification, the employer may not request additional information from the employee. However, if the leave request involves meeting with a third party, the employer may contact the third party to verify the meeting without the employee’s permission. The employer may also contact the Department of Defense (DOD) to verify that the family member is on active duty or call to active duty status without obtaining the employee’s permission.

Servicemember Family Leave-- For leave to take care of a covered servicemember, the employer may require the employee to obtain a certification from the servicemember’s healthcare provider. The certifications must include:

- the provider’s name, address and identifying information;
- whether the injury or illness was incurred in the line of duty on active duty;
- the approximate date on which the injury or illness began and its probably duration;
- a statement of medical facts regarding the health condition, similar to that required for other FMLA leaves; and
- information necessary to establish the need for care and the duration and/or frequency of such need, also similar to other FMLA leaves.

Such certifications may be completed by a DOD or Veterans Administration healthcare provider, or by a TRICARE-authorized private healthcare provider. If the healthcare provider cannot make the necessary

military determinations, then the provider may rely on military determinations reached by an authorized DOD representative.

The employer may also require a certification from the employee, setting forth:

- the name and relationship of the covered servicemember for whose care the employee is requesting leave;
- whether the covered servicemember is a current member of the Armed Forces, National Guard or Reserves;
- the military branch, rank and current unit assignment of the servicemember;
- whether the servicemember is assigned to a military medical facility;
- whether the servicemember is on the temporary disability retired list; and/or
- a description of the care the employee will be providing and an estimate of the amount of leave needed to provide the care.

An employee may submit an “invitational travel order” (ITO) or “invitational travel authorization” (ITA) issued by the military in lieu of a certification. While employers may seek authentication or clarification of the healthcare provider’s certification, second and third opinions and periodic recertifications are not permitted for servicemember family leaves. An employer may require the employee to provide confirmation of the family relationship to the servicemember.

## **Conclusion**

The new guidance, which was issued on November 17, 2008, will become effective on January 16, 2009. A complete copy of the final FMLA regulations can be found at:

<http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763>

If you have a specific military family leave question, please contact your ICS service representative.