



DOL Publishes Family Military Leave Regulations

On November 17, 2008, the Department of Labor (“DOL”) published final regulations under the Family and Medical Leave Act (“FMLA”), which includes guidance with respect to the two family military leaves added to the FMLA in Department of Defense Authorization Act in January, 2008. These two new types of FMLA leaves are **qualifying exigency leaves** and **servicemember caregiver leaves**.

Qualifying Exigency Leaves

Effective January 16, 2009, employees who are FMLA-eligible, and who have a spouse, son, daughter, or parent on active duty or call to active duty status in the National Guard or Reserves in support of a **contingency operation** may use their 12-week leave entitlement to address certain **qualifying exigencies**.

Qualifying exigencies may include attending certain military events, childcare and school activities, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings. Qualifying exigency leaves only apply with respect to a member of the National Guard or Reserves (except for post-deployment activities, which also apply to a regular member of the Armed Forces whose active duty has ended). Qualifying exigency leaves may be taken continuously, intermittently or on a reduced leave schedule.

Contingency operations are defined in Title 10 of the U.S. Code. Employers can verify that a call or order to active duty is “in support of a contingency operation” from the employee’s active duty orders. Those orders will either refer to an applicable Title 10 section or describe the call to active duty as “in support of a contingency operation” (such as the war in either Afghanistan or Iraq).

The final FMLA regulations include an optional form that employers may use to process qualifying exigency leaves (<http://www.shawe.com/pdfs/wh384.pdf>). The employer may use the information on the form to verify that the information is correct.

Servicemember Caregiver Leaves

Effective January 28, 2008, the FMLA was amended to add a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered servicemember during a single 12-month period. A covered servicemember is a current

member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of duty that may render the servicemember medically unfit to perform his or her duties for which the servicemember is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disability retired list.

Documentation of a servicemember caregiver leave must be provided by the employee and must be certified by the servicemember's healthcare provider which must be one of the following:

- A Department of Defense ("DOD") healthcare provider;
- A Veterans Affairs healthcare provider; or
- A TRICARE network or non-network authorized healthcare provider.

The servicemember's DOD recovery care coordinator can provide assistance in this regard.

The FMLA final regulations define *next of kin* for servicemember caregiver purposes as the nearest blood relative who has been designated in writing by the servicemember for FMLA purposes or in the absence of such a designation, any one of a priority order list of a next of kin. Servicemember caregiver leaves apply when a spouse, child, parent or next of kin is a member of the regular U.S. Armed Forces or the Guard or Reserves who is injured in line of duty on active duty (regardless of whether the servicemember is on active duty in support of a contingency operation). A servicemember caregiver leave may be taken continuously, intermittently or on a reduced leave schedule.

The "single 12-month period" during which the 26 weeks of servicemember caregiver leave may be taken is measured on a one-time per servicemember/per injury basis, beginning on the first day the employee takes a servicemember caregiver leave and ending 12 months later, regardless of how the employer measures other FMLA leaves.

Comment: This could be an administratively cumbersome requirement for employers who are administering 12 week FMLA leaves on some other basis.

The final FMLA regulations include an optional form that employers may use to process servicemember caregiver leaves (<http://www.schwabe.com/emails/fmla/images/WH385.pdf>). The employer may contact the servicemember's healthcare provider to authenticate and clarify the medical information provided, but may not request additional information.

What do employers need to do?

- Post the new FMLA notice where required labor relations notices are posted. The new poster can be accessed at <http://www.dol.gov/esa/whd/fmla/NDAAAmdmnts.pdf>.
- Revise FMLA Policies and Procedures to include qualifying exigency leaves and servicemember caregiver leaves.

- Use the new optional FMLA forms for processing requests for FMLA leaves (or customize the FMLA forms to include the new leaves).