



Labor & Employment Update: Revised Final Rule on Family and Medical Leave Act (FMLA)

On November 17, 2008, the Department of Labor published its final rule to implement the first-ever amendments to the Family and Medical Leave Act (“FMLA”), which were signed into law by President George W. Bush in January 2008. The amendments provide new military leave entitlements and serve to update other provisions of the FMLA.

The most significant change to the FMLA under the new Final Rule is the new category of “Military Family Leave”. This category creates two (2) new leave entitlements:

1. **Military Caregiver Leave (also known as Covered Servicemember Leave):** Under this new military family leave entitlement, eligible employees who are family members of covered servicemembers will be able to take up to twenty six (26) workweeks of leave in a “single 12-month period” to care for a covered servicemember with a serious injury or illness incurred in the line of active duty. This twenty six (26) workweek entitlement is a special provision that extends FMLA job-protected leave beyond the normal twelve (12) workweeks of FMLA leave. This provision also extends FMLA protection to additional family members (i.e., next of kin) beyond those who may take FMLA leave for other qualifying reasons.
2. **Qualifying Exigency Leave:** The second new military leave entitlement helps families of members of the National Guard and Reserves manage their affairs while the member is on active duty in support of a contingency operation. This provision makes the normal twelve (12) workweeks of FMLA job-protected leave available to eligible employees with a covered military member serving in the National Guard or Reserves to use for “any qualifying exigency” arising out of the fact that a covered military member is on active duty or called to active duty status in support of a contingency operation. The Final Rule defines a qualifying exigency by referring to several broad categories for which employees can use FMLA leave: (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) Additional activities not encompassed in the other categories, but agreed by the employer and the employee.

The Final Rule also includes two (2) new DOL certification forms that may be used by employees and employers to facilitate the certification requirements for the use of military family leave. Copies of both forms are included herewith.

In addition to the new military leave entitlements, the Final Rule includes the following changes to the FMLA:

- The new Final Rule includes regulatory changes to reflect the U.S. Supreme Court's decision in Ragsdale v. Wolverine World Wide, Inc., which invalidated a penalty provision of the regulations. Ragsdale held that the old regulation's "categorical" penalty for failure to appropriately designate FMLA leave was inconsistent with the statutory entitlement to only twelve (12) weeks of FMLA leave and contrary to the statute's remedial requirement that an employee demonstrate individual harm. The final rule therefore removes these categorical penalty provisions and clarifies that where an employee suffers individualized harm because the employer failed to follow notification rules, the employer may be liable.
- Under the new Final Rule, time spent performing "light duty" work does not count against the employee's FMLA leave entitlement and that the employee's right to restoration is held in abeyance during the period of time the employee performs light duty (or until the end of the applicable twelve (12) month FMLA leave year). If an employee is voluntarily performing a light duty assignment, the employee is not on FMLA leave.
- The Final Rule codifies the DOL's position that employees may voluntarily settle or release their FMLA claims without court or DOL approval. Prospective waivers of FMLA rights continue to be prohibited under the Final Rule.
- The Final Rule retains the six (6) individual definitions of "serious health condition", while adding guidance on three (3) regulatory matters. First of all, the Final Rule clarifies that the "two visits to a health care provider", which was previously an open-ended requirement, must occur within a thirty (30) day period. Secondly, the Final Rule clarifies that, under the definition of "serious health condition" involving more than three (3) consecutive, full calendar days of incapacity plus a regimen of continuing treatment, the first visit to the health care provider must take place within seven (7) days of the first day of incapacity. Thirdly, the Final Rule defines "periodic visits" for chronic serious health conditions as at least two (2) visits to a health care provider per year, since under the previous rule the requirement was also open ended.
- Under the Final Rule, all forms of paid leave offered by the employer will be treated the same, regardless of the type of leave substituted. Under the prior rule, different procedural requirements applied to the use of vacation or personal leave than to medical or sick leave. Under the Final Rule, an employee electing to use any type of paid leave concurrently with FMLA leave must follow the same terms and conditions of the employer's policy that apply to other employees for the use of such leave. The employee is always entitled to unpaid FMLA leave if he or she does not meet the employer's conditions for taking paid leave. Furthermore, the employer may waive any procedural requirements for the taking of any type of paid leave.
- The Final Rule changes the treatment of perfect attendance awards to allow employers to deny perfect attendance awards to employees who do not have perfect attendance because of taking FMLA leave, so long as it treats employees taking non-FMLA leave in an identical way.

- Under the Final Rule, employers will be required to provide employees with a general notice about the FMLA (through a poster, and either an employee handbook or upon hire); an eligibility notice; a rights and responsibilities notice; and a designation notice. In order to ensure employers are better able to inform employees under the new notice provisions, the Final Rule extends the time for employers to provide the aforementioned notices from two (2) business days to five (5).
- The Final Rule provides that an employee needing FMLA leave must follow the employer's usual and customary call-in procedures for reporting an absence, absent unusual circumstances. This modifies the previous rule which allowed employees to notify the need for FMLA up to two (2) business days after an absence, even if they could have provided notice more quickly.
- The Final Rule establishes that, in response to concerns regarding HIPAA, the employer's representative contacting the employee's health care provider must be a health care provider, human resources professional, a leave administrator, or management official, but in no case may it be the employee's direct supervisor. Furthermore, employers may not ask healthcare providers for additional information beyond that required by the certification form. If the employer finds that a medical certification is incomplete or lacking, the employer must specify in writing what information is lacking, and give the employee seven (7) calendar days to cure the deficiency.
- The Final Rule allows an employer to request recertification of an ongoing condition every six (6) months in conjunction with absence, and finally;
- With regard to Fitness for Duty Certifications, the Final Rule allows the employer to require that a fitness for duty certification specifically address the employee's ability to perform the essential duties of the employee's job and, where reasonable job safety concerns exist, an employer may require a fitness-for-duty certification before an employee may return to work when the employee takes intermittent leave.

The Final Rule became effective on January 16, 2009.

Please contact the following attorneys if you have any further questions regarding the new Final Rule on the FMLA:

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PART A: QUALIFYING REASON FOR LEAVE

1. Describe the reason you are requesting FMLA leave due to a qualifying exigency (including the specific reason you are requesting leave):

2. A complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes any available written documentation which supports the need for leave; such documentation may include a copy of a meeting announcement for informational briefings sponsored by the military, a document confirming an appointment with a counselor or school official, or a copy of a bill for services for the handling of legal or financial affairs. Available written documentation supporting this request for leave is attached. Yes No None Available

PART B: AMOUNT OF LEAVE NEEDED

1. Approximate date exigency commenced: _____

Probable duration of exigency: _____

2. Will you need to be absent from work for a single continuous period of time due to the qualifying exigency? No Yes.

If so, estimate the beginning and ending dates for the period of absence:

3. Will you need to be absent from work periodically to address this qualifying exigency? No Yes.

Estimate schedule of leave, including the dates of any scheduled meetings or appointments: _____

Estimate the frequency and duration of each appointment, meeting, or leave event, including any travel time (i.e., 1 deployment-related meeting every month lasting 4 hours):

Frequency: _____ times per _____ week(s) _____ month(s)

Duration: _____ hours _____ day(s) per event.

PART C:

If leave is requested to meet with a third party (such as to arrange for childcare, to attend counseling, to attend meetings with school or childcare providers, to make financial or legal arrangements, to act as the covered military member's representative before a federal, state, or local agency for purposes of obtaining, arranging or appealing military service benefits, or to attend any event sponsored by the military or military service organizations), a complete and sufficient certification includes the name, address, and appropriate contact information of the individual or entity with whom you are meeting (i.e., either the telephone or fax number or email address of the individual or entity). This information may be used by your employer to verify that the information contained on this form is accurate.

Name of Individual: _____ Title: _____

Organization: _____

Address: _____

Telephone: (_____) _____ Fax: (_____) _____

Email: _____

Describe nature of meeting: _____

PART D:

I certify that the information I provided above is true and correct.

Signature of Employee

Date

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution AV, NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION; RETURN IT TO THE EMPLOYER.**

Certification for Serious Injury or Illness of Covered Servicemember - - for Military Family Leave (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division



OMB Control Number: 1215-0181
Expires: 12/31/2011

Notice to the EMPLOYER INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA leave due to a serious injury or illness of a covered servicemember to submit a certification providing sufficient facts to support the request for leave. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. § 825.310. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies.

SECTION I: For Completion by the EMPLOYEE and/or the COVERED SERVICEMEMBER for whom the Employee Is Requesting Leave INSTRUCTIONS to the EMPLOYEE or COVERED SERVICEMEMBER: Please complete Section I before having Section II completed. The FMLA permits an employer to require that an employee submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a serious injury or illness of a covered servicemember. If requested by the employer, your response is required to obtain or retain the benefit of FMLA-protected leave. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to do so may result in a denial of an employee's FMLA request. 29 C.F.R. § 825.310(f). The employer must give an employee at least 15 calendar days to return this form to the employer.

SECTION II: For Completion by a UNITED STATES DEPARTMENT OF DEFENSE ("DOD") HEALTH CARE PROVIDER or a HEALTH CARE PROVIDER who is either: (1) a United States Department of Veterans Affairs ("VA") health care provider; (2) a DOD TRICARE network authorized private health care provider; or (3) a DOD non-network TRICARE authorized private health care provider INSTRUCTIONS to the HEALTH CARE PROVIDER: The employee listed on Page 2 has requested leave under the FMLA to care for a family member who is a member of the Regular Armed Forces, the National Guard, or the Reserves who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list for a serious injury or illness. For purposes of FMLA leave, a serious injury or illness is one that was incurred in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating.

A complete and sufficient certification to support a request for FMLA leave due to a covered servicemember's serious injury or illness includes written documentation confirming that the covered servicemember's injury or illness was incurred in the line of duty on active duty and that the covered servicemember is undergoing treatment for such injury or illness by a health care provider listed above. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the employee is seeking leave.

Certification for Serious Injury or Illness
of Covered Servicemember - - for
Military Family Leave (Family and
Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division



SECTION I: For Completion by the EMPLOYEE and/or the COVERED SERVICEMEMBER for whom the Employee Is Requesting Leave: (This section must be completed first before any of the below sections can be completed by a health care provider.)

Part A: EMPLOYEE INFORMATION

Name and Address of Employer (this is the employer of the employee requesting leave to care for covered servicemember):

Name of Employee Requesting Leave to Care for Covered Servicemember:

First Middle Last

Name of Covered Servicemember (for whom employee is requesting leave to care):

First Middle Last

Relationship of Employee to Covered Servicemember Requesting Leave to Care:

Spouse Parent Son Daughter Next of Kin

Part B: COVERED SERVICEMEMBER INFORMATION

(1) Is the Covered Servicemember a Current Member of the Regular Armed Forces, the National Guard or Reserves? ___Yes ___No

If yes, please provide the covered servicemember's military branch, rank and unit currently assigned to:

Is the covered servicemember assigned to a military medical treatment facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit)? ___Yes ___No If yes, please provide the name of the medical treatment facility or unit:

(2) Is the Covered Servicemember on the Temporary Disability Retired List (TDRL)? ___Yes ___No

Part C: CARE TO BE PROVIDED TO THE COVERED SERVICEMEMBER

Describe the Care to Be Provided to the Covered Servicemember and an Estimate of the Leave Needed to Provide the Care:

SECTION II: For Completion by a United States Department of Defense (“DOD”) Health Care Provider or a Health Care Provider who is either: (1) a United States Department of Veterans Affairs (“VA”) health care provider; (2) a DOD TRICARE network authorized private health care provider; or (3) a DOD non-network TRICARE authorized private health care provider. If you are unable to make certain of the military-related determinations contained below in Part B, you are permitted to rely upon determinations from an authorized DOD representative (such as a DOD recovery care coordinator). (Please ensure that Section I above has been completed before completing this section.) Please be sure to sign the form on the last page.

Part A: HEALTH CARE PROVIDER INFORMATION

Health Care Provider’s Name and Business Address:

Type of Practice/Medical Specialty: _____

Please state whether you are either: (1) a DOD health care provider; (2) a VA health care provider; (3) a DOD TRICARE network authorized private health care provider; or (4) a DOD non-network TRICARE authorized private health care provider: _____

Telephone: () _____ Fax: () _____ Email: _____

PART B: MEDICAL STATUS

(1) Covered Servicemember’s medical condition is classified as (Check One of the Appropriate Boxes):

- (VSI) Very Seriously Ill/Injured** – Illness/Injury is of such a severity that life is imminently endangered. Family members are requested at bedside immediately. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)
- (SI) Seriously Ill/Injured** – Illness/injury is of such severity that there is cause for immediate concern, but there is no imminent danger to life. Family members are requested at bedside. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)
- OTHER Ill/Injured** – a serious injury or illness that may render the servicemember medically unfit to perform the duties of the member’s office, grade, rank, or rating.
- NONE OF THE ABOVE** (Note to Employee: If this box is checked, you may still be eligible to take leave to care for a covered family member with a “serious health condition” under § 825.113 of the FMLA. If such leave is requested, you may be required to complete DOL FORM WH-380 or an employer-provided form seeking the same information.)

(2) Was the condition for which the Covered Service member is being treated incurred in line of duty on active duty in the armed forces? ___ Yes ___ No

(3) Approximate date condition commenced: _____

(4) Probable duration of condition and/or need for care: _____

(5) Is the covered servicemember undergoing medical treatment, recuperation, or therapy? ___ Yes ___ No. If yes, please describe medical treatment, recuperation or therapy:

PART C: COVERED SERVICEMEMBER'S NEED FOR CARE BY FAMILY MEMBER

- (1) Will the covered servicemember need care for a single continuous period of time, including any time for treatment and recovery? Yes No
If yes, estimate the beginning and ending dates for this period of time: _____

- (2) Will the covered servicemember require periodic follow-up treatment appointments?
 Yes No If yes, estimate the treatment schedule: _____

- (3) Is there a medical necessity for the covered servicemember to have periodic care for these follow-up treatment appointments? Yes No

- (4) Is there a medical necessity for the covered servicemember to have periodic care for other than scheduled follow-up treatment appointments (e.g., episodic flare-ups of medical condition)? Yes No If yes, please estimate the frequency and duration of the periodic care:

Signature of Health Care Provider: _____ **Date:** _____

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