EMPLOYMENT LAW PRACTICE GROUP ALERT
November 2008

# New FMLA Rule Effective January 16, 2009

The Department of Labor (DOL) has published a final rule on the Family and Medical Leave Act (FMLA), which will become effective on January 16, 2009. The rule both implements recent amendments to the FMLA that provide leave entitlements for family of military servicemembers and revises the DOL's prior FMLA regulations in various respects. The following is a summary of the highlights of the new rule.

## Military Family Leave

The National Defense Authorization Act for FY 2008 (NDAA), which President Bush signed into law on January 28, 2008, created two new categories of FMLA leave for families of military servicemembers: (1) "qualifying exigency" leave, stemming from the call to active duty of an employee's family member who is in the National Guard or military Reserve, and (2) "military caregiver leave," providing employees with up to 26 weeks of leave to care for family members who are military servicemembers with a serious illness or injury.

**Qualifying Exigency Leave.** An eligible employee who is the spouse, son, daughter, or parent of a member of the Armed Forces may take FMLA leave for "any qualifying exigency" if the servicemember is on active duty or has been notified of an impending call or order to active duty in support of a contingency operation. 29 U.S.C. § 2612(a)(1)(E).

- **Relationship to other FMLA leave**. Qualifying exigency leave is part of, not in addition to, the 12 weeks of FMLA leave that an eligible employee may take in a 12-month period. 29 U.S.C. § 2612(a)(1).

- **Restriction to family of National Guard and Reserves**. "Qualifying exigency" leave is only available to employees with family members in the National Guard or the Reserves and to employees with family who are retired military servicemembers called to active duty. It is not available to employees with family members in the Regular Armed Forces. 29 C.F.R. § 825.126(b)(2). By contrast, as described below, employees with family members who are Regular Armed Forces servicemembers are eligible for military caregiver leave. See 29 C.F.R. § 825.127(a).

- **Broader definition of child**. Unlike previously available FMLA leave (which may be used to care for adult children only in limited circumstances), qualifying exigency leave is available to employees for a "qualifying exigency" that concerns a son or daughter servicemember of any age. 29 C.F.R. § 825.122(g); § 825.126(b)(1).

- **Definition of "qualifying exigencies."** The new rule (29 C.F.R. § 825.126(a)) defines the categories of qualifying exigencies for which eligible family of a covered military member may take leave:

  — **Short-notice deployment:** Up to seven calendars days of leave "to address any issue" that arises when a covered military member is called to active duty seven days or fewer before deployment.

  — **Military events and related activities:** To attend any ceremony, event, program, or activity sponsored by the military, a military service organization, or the American Red Cross.

- **Childcare and school activities:** To attend to various childcare and school activities affected by a covered military member's call to active duty, such as to arrange for alternative childcare, provide emergency childcare, or deal with school or daycare enrollment, necessitated by the active duty call, or to attend school meetings necessary due to circumstances arising from the active duty call.
- **Financial and legal arrangements** to "address" the covered military member's absence.
- **Counseling** for oneself, a covered military member, or a child, other than by a health care provider, necessitated by a call to active duty.
- **Rest and recuperation** with a covered military member who is on temporary, short-term R&R during a period of deployment.
- **Post-deployment activities:** To attend military-sponsored events within 90 days after deployment.
- **Additional activities** arising from a call to active duty that are agreed upon between the employer and the employee.

**Military Caregiver Leave**. A spouse, son, daughter, parent, or "next of kin" may take up to 26 weeks of unpaid leave during a single 12-month period to care for a military servicemember "who is undergoing medical treatment, recuperation or therapy, is in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness." 29 U.S.C. § 2611(16).

- **Eligibility**. Unlike qualifying exigency leave, military caregiver leave is available to family members of all military servicemembers, including members of the Regular Armed Forces. 29 C.F.R. § 825.127(a).
- **Relationship to regular FMLA leave**. In general, employees may take a combined total of 26 weeks of military caregiver and regular FMLA leave in a 12-month period. 29 U.S.C. § 2612(a)(4). However, the 12-month period for military caregiver leave begins on the first day of such leave, regardless of the employer's method of calculating the 12-month leave period for other types of FMLA leave. 29 C.F.R. § 825.127(c)(1). As a result, an employee who has taken other FMLA leave before beginning military caregiver leave may be entitled to more than 26 weeks of leave in the 12-month period beginning with the earlier FMLA leave. Tracking FMLA leave when military caregiver leave is involved is thus more complicated than tracking ordinary FMLA leave. In its introduction to the new rule, the DOL acknowledged the "complexity" of tracking leave under two different 12-month periods and provided examples of how the two periods may interact. 73 Fed. Reg. 67,970-71. The DOL's examples are set out in Endnote 1.[1]
- **Broader definition of child**. Unlike previously available FMLA leave (which may be taken to care for adult children only in limited circumstances), and like "qualifying exigency" leave, military caregiver leave is available to care for a son or daughter servicemember of any age. 29 C.F.R. § 825.122(h); § 825.127(b)(1).
- **Next of kin**. The servicemember's "next of kin" is the "nearest blood relative" (other than a spouse, parent, son or daughter), with the governing order of priority being that specified in the rule, unless the employee has designated another blood relative as "next of kin" for the purpose of military caregiver leave. 29 C.F.R. § 825.127(b)(3).

- **Per-servicemember, per-injury basis**. An employee may take more than one 26-week period of leave to care for a military servicemember only to care for a different servicemember or for a different serious injury or illness to the same servicemember. In no case may an employee take more than 26 weeks of leave in a single 12-month period. 29 C.F.R. § 825.127(c)(2).

## Other Revisions to the FMLA Regulations

**Intermittent Leave.** Employees taking intermittent FMLA leave for planned medical treatment must make a "reasonable effort" (as opposed to the previous "attempt") to schedule their leave so that it does not unduly disrupt an employer's operations. 29 C.F.R. § 825.203. Intermittent FMLA must be calculated in the shortest increment of time used for other forms of leave (or increments of one hour, whichever is smaller), not necessarily in the shortest increment for which an employer's payroll system is capable of accounting. 29 C.F.R. § 825.205(a).

**Serious Health Condition.** The new rule does not change the basic definitions of "serious health condition" (29 C.F.R. §§ 825.113-115), but clarifies them in three ways:

- If an employee's "serious health condition" is based on three consecutive calendar days of incapacity plus two visits to a healthcare provider, the first visit must occur within 7 days of and both visits must occur within 30 days of the beginning of the period of incapacity. 29 C.F.R. § 825.115(a)(1), (a)(3).

- If an employee's "serious health condition" is based on three consecutive calendar days of incapacity plus a "regimen of continuing treatment," the employee must visit a healthcare provider within 7 days of the onset of incapacity. 29 C.F.R. § 825.115(a)(2), (a)(3).

- If an employee's "serious health condition" is based on "periodic visits to a healthcare provider" for a chronic serious health condition, the employee must make at least two visits to a healthcare provider per year. 29 C.F.R. § 825.115(c).

**Notice Obligations for Employers and Employees.** The final rule makes several changes to notice provisions affecting both employers and employees.

- **Employers**:

  — may post a general FMLA notice (explaining the statute's provisions and providing information concerning the procedures for employees to file complaints) in electronic form if such posting meets the other posting requirements. 29 C.F.R. § 825.300(a)(1).

  — must also include notice in an employee handbook or other written guidance to employees concerning employee benefits or referencing leave (if such documents exist); otherwise they must distribute such notice to employees upon hiring. 29 C.F.R. § 825.300(a)(3).

  — must, where a significant portion of an employer's workforce is not literate in English, provide the general notice in a language in which the employees are literate.[2]

  — must (absent extenuating circumstances) notify employees of their eligibility for FMLA leave, their rights and responsibilities with respect to FMLA leave, and the employer's designation of an employee's leave as FMLA leave within 5 days (rather than the current 2 days) of the date an employee requests leave or the employer learns that the leave might be for an FMLA-qualified reason. 29 C.F.R. § 825.300(b)-(d).

- **Employees**:

  — must provide at least 30 days advance notice of their need for FMLA leave when leave is based on the on-time birth, placement or adoption of a child, or the planned medical treatment of the employee or a family member. 29 C.F.R. § 825.302(a).

  — where 30 days notice is not practicable, must provide notice "as soon as practicable," rather than within one or two business days as in the previous regulations. 29 C.F.R. § 825.302(a)-(b).

  — must comply with an employer's usual and customary policy for requesting leave (e.g., contacting a specific individual), absent unusual circumstances. 29 C.F.R. § 825.302(d).

**Certifications.** The new rule modifies the previous regulations governing medical certifications for a serious health condition of the employee or a family member and creates separate certification regulations for military family leave.

- **Certification of serious health condition**. The new rule:

  — permits certification forms to state that medical facts regarding the health condition for which FMLA leave is requested may include symptoms, diagnoses, and whether medication was prescribed, 29 C.F.R. § 825.306(a)(3), and permits an employee to comply with the certification requested by providing the employer with an authorization to communicate directly with the employee's or family member's health care provider. Employees may not be required to provide such authorization in order to obtain FMLA leave. 29 C.F.R. § 825.306(e).

  — permits employers to contact an employee's health care provider directly to authenticate or clarify information stated in a medical certification form. The contact may not be made by the employee's direct supervisor, and the employer may not request information beyond what is on the certification form. 29 C.F.R. § 825.307(a).

  — requires employees to consent to the release of relevant medical information to a health care provider designated by the employer to provide a second or third opinion, if the information is necessary to render a sufficient and complete opinion. 29 C.F.R. § 825.307(b)-(c).

  — permits employers to require recertifications for long-term health conditions every six months, 29 C.F.R. § 825.308(b), and to require a new certification every year. 29 C.F.R. § 825.305(e).

- **Certification of qualifying exigency**. An employer may require an employee seeking qualifying exigency leave to provide a copy of the covered military member's active duty orders and a signed statement supporting the need for leave. 29 C.F.R. § 825.309.

- **Certification of military caregiver leave**. An employer may require an employee seeking military caregiver leave to provide a statement from a Department of Defense or Department of Veterans Affairs-affiliated health care provider describing the health condition for which leave is requested and supporting the need for leave. 29 C.F.R. § 825.310.

**Fitness-for-Duty Certifications.** Employees have the same obligation to provide fitness-for-duty certification at the conclusion of FMLA leave (pursuant to a uniformly-applied policy or practice applicable to similarly-situated employees) as they do to cooperate and participate in the initial certification process. 29 C.F.R. § 825.312(a). Employers may require that fitness-for-duty certification address the

employee's ability to perform the essential functions of his/her job, as long as the employer has previously notified the employee that such a certification will be required and provided to the employee a list of essential functions. 29 C.F.R. § 825.312(b).

**Bonuses.** Contrary to under the prior regulations, an employer may disqualify an employee on FMLA leave from receiving an achievement bonus (e.g., a perfect attendance bonus) if the employee fails to make the goal because of FMLA leave, as long as the employer treats employees on non-FMLA leave the same way. 29 C.F.R. § 825.215(c)(2).

**Waiver of Rights/Claims.** The new rule confirms DOL's view that (contrary to a Fourth Circuit decision) employees may voluntarily settle and release FMLA claims without the prior approval of a court or the DOL. 29 C.F.R. § 825.220(d).

**Substitution of Paid Leave for FMLA Leave.** An employer may now apply its normal leave rules (e.g., regarding advance notice) when an employee seeks to substitute any sort of paid leave for FMLA leave. 29 C.F.R. § 825.207. The prior regulations permitted employers to apply their normal policies to sick leave or medical leave, but not to vacation leave or personal leave.

**Retroactive Designation of FMLA Leave.** In recognition of the Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), the new rule permits employers to designate an employee's leave as FMLA leave retroactively at any time, as long as that retroactive designation does not harm or injure the employee. 29 C.F.R. § 825.301(d). An employer will only be liable for failure to comply with the time requirements for designation of leave when such failure causes harm or injury. 29 C.F.R. § 825.300(e).

**Gaps in Service.** For purposes of calculating an employee's eligibility for FMLA leave, the minimum of 12 months for which an employee must have been employed need not be consecutive. However, employment prior to a break in service of seven years or more need not be counted, unless the break was due to National Guard or Reserve military service or the employee and the employer had a written rehire agreement. 29 C.F.R. § 825.110(b).

**Reorganization.** With the goal of enhancing usability, the new rule reorganizes the prior regulations, including by removing questions from the titles of section (e.g. "What is the Family and Medical Leave Act, and to Whom Does It Apply?"), consolidating some sections, and moving others.

The full text version of the final rule can be accessed on the DOL's website: http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763. The DOL has posted other resources regarding the final rule at http://www.dol.gov/esa/whd/fmla/finalrule.htm.

The DOL has also issued the following new forms:

(1) certification of an employee's serious health condition (WH-380-E);
(2) certification of a family member's serious health condition (WH-380-F);
(3) general notice of FMLA rights and responsibilities to be posted in the workplace (WH Publication 1420);
(4) notification to an employee taking leave of rights and responsibilities under FMLA (WH-381);
(5) a designation notice to an employee whose leave is being designated as FMLA leave (WH-382);
(6) certification of qualifying exigency (WH-384); and
(7) certification for serious injury or illness of covered servicemember (WH-385).

## Endnotes

[1] The DOL has provided the following example of how employers should "reconcile'' the use of leave to care for a covered servicemember with other FMLA leave if two different leave years are used. The example explains how an employer would calculate an employee's entitlement to military caregiver leave when it utilizes a calendar year method for other FMLA-qualifying reasons.

> The employer uses the calendar year method (January 2009–December 2009) for determining an employee's leave balance for FMLA leave taken for all qualifying reasons other than military caregiver leave. An employee first takes military caregiver leave in June 2009. Between June 2009 and June 2010 (the "single 12-month period'' for military caregiver leave), the employee can take a combined total of 26 workweeks of leave, including up to 12 weeks for any other qualifying FMLA reason if he has not yet taken any FMLA leave in 2009.
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> If, however, the employee had already taken five weeks of FMLA leave for his own serious health condition when he began taking military caregiver leave in June 2009, he would then be entitled to no more than seven weeks of FMLA leave for reasons other than to care for a covered servicemember during the remainder of the 2009 calendar year (i.e., the 12 weeks yearly entitlement minus the five weeks already taken). Although his entitlement to FMLA leave for reasons other than military caregiver leave is limited by his prior use of FMLA leave during the calendar year, the employee is still entitled to take up to 26 weeks of FMLA leave to care for a covered servicemember from June–December 2009.
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> Beginning in January 2010, the employee is entitled to an additional 12 weeks of FMLA leave for reasons other than to care for a covered servicemember. If the employee takes four weeks of FMLA leave for his own serious health condition in January 2010, this would reduce both the number of available weeks of FMLA leave remaining in calendar year 2010 (i.e., the 12 weeks yearly entitlement minus the four weeks already taken) and the number of weeks of FMLA leave available for either military caregiver leave or other FMLA qualifying reasons during the "single 12-month period'' of June 2009–June 2010.
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> Once the employee exhausts his or her 26- workweek entitlement, he or she may not take any additional FMLA leave for any reason until the "single 12-month period'' ends. Thus, for example, if the employee took 20 workweeks of military caregiver leave from June–December 2009, four workweeks of leave in January 2010 for his or her own serious health condition, and another two workweeks of military caregiver leave in March 2010, the employee will have exhausted his or her 26-workweek entitlement for the "single 12-month period'' of June 2009–June 2010. While the employee would still have eight weeks of FMLA leave available in calendar year 2010, the employee could not take such leave until after June 2010, when the "single 12-month period'' ends.

73 Fed. Reg. 67,970-71.

[2] Prototypes are available on the Internet at www.wagehour.dol.gov.

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**If you have any questions about the new provisions, please contact Ellen Martin at 212.336.2860, Lisa Cleary at 212.336.2159, or Aron Fischer at 212.336.2363.**

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