

LEGISLATIVE BRIEF

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FMLA Rights for Military Families

The Family and Medical Leave Act (FMLA) was enacted in 1993 to give eligible employees working for covered employers the ability to balance their work and family life by taking unpaid, job-protected leave for certain reasons. As enacted, the FMLA did not provide specific leave protections for military families. In 2008, however, the FMLA was amended to create two military family leave entitlements: qualifying exigency leave and military caregiver leave. In 2009, legislation was signed into law expanding the eligibility criteria for both types of military family leave.

This issue of the Brown & Brown Consulting Legislative Brief provides a brief overview of the FMLA and summarizes the military family leave entitlements.

FMLA OVERVIEW

The FMLA generally provides that covered employers must:

- Allow an eligible employee to take up to 12 weeks of unpaid leave during any 12-month period for certain reasons, or up to 26 weeks in a single 12-month period to care for a covered servicemember with a serious injury or illness;
- Continue the employee's group health benefits while on leave; and
- Restore the employee to the same or equivalent job upon return from leave.

Covered Employers

The FMLA applies to private-sector employers that employed **50 or more employees** in 20 or more workweeks in the current or preceding calendar year. It also applies to all public agencies, including local, state and federal employers, and public and private elementary and secondary schools.

Eligible Employees

An employee is eligible for FMLA leave if he or she:

- Currently works for a covered employer;
- Has worked for this employer for a total of **12 months** (does not need to be consecutive);
- Has worked at least **1,250 hours** over the previous 12 months;
- Works in the United States, District of Columbia, or any Territory or possession of the U.S.; and
- Works at a location where the employer has at least **50 employees** within a **75-mile radius** at the time the employee requests leave.

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Reasons for Leave

Covered employers must grant eligible employees up to **12 weeks** of unpaid leave during any 12-month period for any of the following reasons:

- Birth and care of a newborn child of the employee;
- Placement of a child under the age of 18 for adoption or foster care with the employee;
- Care for an immediate family member (spouse, child or parent) with a serious health condition;
- The employee is unable to work because of his or her own serious health condition; or
- Any qualifying exigency arising out of the covered active duty or order to covered active duty of a family member (spouse, child or parent) in the Armed Forces.

Covered employers must grant eligible employees up to a total of **26 weeks** of unpaid leave during a single 12-month period to care for a covered servicemember with a serious injury or illness who is their spouse, child, parent or next of kin.

Employee Notice Requirements

If leave is foreseeable, the employee must provide the employer with at least **30 days'** advance notice whenever practicable. If a 30-day notice is not possible or if the leave is not foreseeable, notice must be given as soon as practicable. As soon as practicable ordinarily means an employee would provide verbal notice to his or her employer within one or two business days of when the need for leave becomes known to the employee.

For a foreseeable leave due to a family member's covered active duty or order to covered active duty in the Armed Forces, notice must be provided as soon as practicable, regardless of how far in advance such leave is foreseeable.

An employer may also require that an employee needing FMLA leave follow the employer's usual and customary notice and procedural requirements for requesting leave (for example, call-in procedures), absent unusual circumstances. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed for a particular reason, such as to care for a covered servicemember with a serious injury or illness.

Employer Designation of Leave

Employers are responsible for designating any leave taken as FMLA leave and for notifying an employee of the designation. This should take place within five business days of an employer's learning that the leave is being taken for an FMLA purpose, absent extenuating circumstances. The designation notice to the employee must be in writing. The Department of Labor (DOL) has a sample FMLA designation notice available at: www.dol.gov/whd/forms/WH-382.pdf.

MILITARY FAMILY LEAVE ENTITLEMENTS

Qualifying Exigency Leave

Qualifying exigency leave was created to help eligible employees manage their affairs when family members are called to covered active duty, or serving in covered active duty, with the Armed Forces.

Eligibility

The FMLA permits eligible employees to take up to 12 weeks of leave during a 12-month period for a "qualifying exigency" arising from a spouse's, child's or parent's covered active duty or call to covered active duty in the Armed Forces, including the Reserves or National Guard.

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For members of a regular component of the Armed Forces, "covered active duty" is defined as duty under a call or order to active duty during deployment to a foreign country. For members of a Reserve component of the Armed Forces, "covered active duty" means duty under a call or order to active duty during deployment to a foreign country in support of a contingency operation.

Qualifying exigency leave may be taken on an intermittent basis or reduced leave schedule basis.

Types of Qualifying Exigencies

A qualifying exigency includes:

- Issues arising from short notice deployment (that is, deployment on seven or less calendar days of notice), for a period of seven calendar days beginning on the date the covered military member is notified of a call to active duty;
- Military events and related activities, such as attendance at official ceremonies, programs/events, family support or assistance programs and informational briefings;
- Childcare and school activities, such as arranging for alternative childcare when the active duty requires a change to the existing childcare or temporary childcare, enrolling or transferring to a new school or day care or attending school meetings;
- Financial and legal arrangements, such as addressing or updating financial and healthcare powers of attorney or wills or appearing before agencies regarding military benefits;
- Attending counseling, arising from the active duty status;
- Taking up to five days of leave to spend time with a covered military member who is on short-term temporary, rest and recuperation leave during deployment;
- Attending to certain post-deployment activities, such as attending arrival ceremonies or any other official ceremony or program for a period of 90 days following the termination of active service, and addressing issues arising from the death of a covered military member; and
- Additional activities that the employer and employee agree qualify as an exigency, such as, for example, attending to household emergencies that would have normally been handled by the military family member.

Certification

An employer may require that an employee's request for leave be supported by a certification when a family member is on covered active duty or has been notified of an impending call or order to covered active duty in the Armed Forces.

Military Caregiver Leave

Military caregiver leave was created to help eligible employees care for covered servicemembers with serious illnesses or injuries.

Eligibility

The FMLA permits eligible employees to take up to 26 weeks of leave during a single 12-month period to care for a qualifying relative (parent, spouse, child or relative to whom the employee is next of kin) who:

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- Is a current member of the Armed Forces, including the Reserves or National Guard, undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status or is otherwise on the temporary disability retired list for a serious illness or injury; or
- Is a veteran who is undergoing medical treatment, recuperation or therapy for a serious illness or injury and who was a member of the Armed Forces, including the Reserves or National Guard, at any time during the five-year period before undergoing the medical treatment, recuperation or therapy.

For a current member of the Armed Forces, a “serious injury or illness” is an injury or illness that was incurred by the servicemember in the line of duty on active duty in the Armed Forces (or existed before the beginning of active duty and was aggravated by service in the line of duty on active duty) and that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating.

For a veteran, a “serious injury or illness” means a qualifying injury or illness that was incurred by the servicemember in the line of duty on active duty in the Armed Forces (or existed before the beginning of active duty and was aggravated by service in the line of duty on active duty) and that manifested itself either before or after the servicemember became a veteran.

The DOL has taken the position that employers are not required to provide military caregiver leave to family members of veterans until final regulations are issued on this leave requirement. In the meantime, eligible employees can take up to 12 weeks of FMLA leave to care for a veteran with a serious health condition who is their spouse, parent or child (if under age 18 or disabled). Employers may also provide employees with leave to care for an injured or ill veteran beyond the leave required by the FMLA. However, this type of leave would not be FMLA-protected and could not be counted against an employee’s FMLA entitlement.

Military caregiver leave may be taken on an intermittent basis or on a reduced leave schedule basis.

Certification

An employer may require that an employee’s request for military caregiver leave be supported by a certification completed by an authorized health care provider.

ADDITIONAL RESOURCES

The DOL maintains several webpages dedicated to providing information about the FMLA. A general discussion of the FMLA is available at: www.dol.gov/whd/fmla/index.htm. The DOL has developed sample FMLA forms and notices, including sample certification forms for qualifying exigency leave and military caregiver leave, which are available through the same webpage. However, please note that the DOL’s sample certification forms have not been updated for the 2009 military leave legislation.

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