



Congress Amends The Family And Medical Leave Act To Add A New Category Of Protected Leave For Military Families

by Diane M. Juffras

The federal Family and Medical Leave Act (FMLA) gives eligible employees the right to twelve weeks of unpaid leave each year to care for a family member's serious health condition.¹ Sometimes, however, the need for leave extends beyond twelve weeks. For employees who have family members in the armed forces who are in need of extended care, an amendment to the FMLA provides additional relief.

The National Defense Authorization Act for Fiscal Year 2008, signed into law on January 28, 2008, amends the FMLA by adding a new category of leave, servicemember family leave.² Effective immediately, servicemember family leave entitles the spouse, child, parent or next of kin of a member of the U.S. Armed Forces (including the National Guard and the Reserves) to a total of *twenty-six* workweeks of unpaid leave during a twelve-month period to care for a servicemember who is receiving medical treatment, is recuperating or undergoing therapy for a serious injury or illness incurred in the line of duty.³

Restriction on Total Amount of Leave

In contrast to all other FMLA leaves, servicemember family leave may be taken only once and does not again become available with the start of a new FMLA year.⁴ An employee may not take more than a combined total of 26 workweeks of leave in any year in which he or she uses servicemember family

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1. The Family and Medical Leave Act is codified at 29 U.S.C. §§ 2601-2654. Implementing regulations may be found at 29 C.F.R. Part 825. The right to twelve weeks of leave also applies when the employee himself or herself has a serious health condition.

2. The National Defense Authorization Act for Fiscal Year 2008 was introduced as H.R. 4986 and passed by Congress as Pub. L. 110-181. Section 585 of the Act amends the FMLA.

3. See Pub. L. 103-3 §§101 (16), (17) and 102(a)(3); 29 U.S.C. §§ 2611(16), (17) and 2612(a)(3).

4. See Pub. L. 103-3 §102(a)(3) ; 29 U.S.C. § 2612(a)(3).

leave. In other words, an employee who has used 26 weeks of servicemember family leave is not entitled to an additional 12 weeks of leave even if he or she develops a serious health condition later in the same year.⁵

Eligibility Requirements

Servicemember family leave is a form of FMLA leave. Therefore, the same eligibility requirements apply to servicemember family leave as apply to all other FMLA leaves. To be eligible for servicemember family leave, as for all other forms of FMLA leave, an employee must have worked for the employer for a minimum of twelve months and must have worked at least 1,250 hours during the immediately preceding twelve-month period.⁶ In addition, the employee must work for an employer that has at least 50 employees in a 75-mile radius of the employee's workplace.⁷

Intermittent Leave

Leave on a reduced leave schedule is available under servicemember family leave on the same terms as it is for all other FMLA leaves.⁸

Use of Paid Leave

As is the case with other forms of FMLA leave, an employer may require or an employee may choose to use any accrued paid sick or vacation leave during the servicemember family leave as a way of turning unpaid FMLA leave into paid FMLA leave.⁹

Medical Certification

An employer may require that a request for servicemember family leave be supported by a medical certification like that used for all other FMLA leaves. Requests for certification should be directed to the health care provider of the ill or injured servicemember.¹⁰

Exigency Leave

The National Defense Authorization Act made one more change that is not yet effective. It added an additional circumstance giving rise to an entitlement to FMLA leave – “qualifying exigencies.”

5. *See* Pub. L. 103-3 §102(a)(4); 29 U.S.C. § 2612(a)(4).

6. *See* Pub. L. 103-3§ 101(2)(A); 29 U.S.C. § 2611(2)(A).

7. *See* Pub. L. 103-3§ 101(2)(B)(ii); 29 U.S.C. § 2611(2)(B)(ii).

8. *See* Pub. L. 103-3§102(b)(1); 29 U.S.C. § 2612(b)(1).

9. *See* Pub. L. 103-3§102(d)(1) and (2)(B); 29 U.S.C. § 2612(d)(1) and (2)(B).

10. *See* Pub. L. 103-3§103(a); 29 U.S.C. §2613(a).

Employees who have a spouse, child or parent on active duty in support of a military operation in which that servicemember may be involved in hostilities against an enemy force will be entitled to up to twelve weeks of leave for qualifying exigencies arising out of that operation. What is a “qualifying exigency?” The new law does not define the term but instructs the Secretary of Labor to issue regulations. As of the publication date of this Bulletin, the Secretary has not yet done so. Employee rights to exigency leave will not be effective until regulations governing its use are issued by the Secretary of Labor.¹¹

Practical Advice for Public Employers

First, North Carolina public employers should amend their FMLA policies immediately to reflect employees’ right to servicemember family leave. Employers should go to <http://www.dol.gov/esa/whd/fmla/NDAAAmndmnts.pdf> to download an addition to the Department of Labor’s approved FMLA posting notice that explains servicemember family leave.¹² In the absence of any guidance from the U.S. Department of Labor to the contrary, employers should treat servicemember family leave requests as they would any other request for FMLA leave. Employers should respond orally within two business days after receiving the request. Employers must give employees a written response that details the employer’s specific expectations and the employee’s specific obligations during the period of FMLA leave. The written response must be given to an employee by the next regular payday following the request for leave.¹³ While employees are on servicemember family leave, whether paid or unpaid, employers must maintain their group health plan benefits on the same terms as if they were actively employed.¹⁴

Second, the human resources department—or other department with responsibility for administering the FMLA—should immediately begin educating supervisors about servicemember family leave. Employees frequently approach their immediate supervisors first when they need to take leave. It is imperative that supervisors respond appropriately to such requests and inform the department in charge of administering FMLA leave of an employee request, so that the employer may make its response within the required timeframe.

Finally, employers should periodically check the Department of Labor’s website for updates on the use of qualifying exigency leave. The website URL is http://www.dol.gov/esa/whd/fmla/NDAA_fmla.htm.

11. See Pub. L. 103-3§102(a)(1)(E) ; 29 U.S.C. § 2612(a)(1)(E).

12. As of the publication date of this Bulletin, the Department of Labor has not yet made changes to its medical certification form (available at <http://www.dol.gov/esa/regs/compliance/whd/fmla/wh380.pdf>) to reflect the addition of servicemember family leave to the FMLA.

13. See 29 C.F.R. §§ 825.208 and 825.301.

14. See 29 C.F.R. § 825.209(a).

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