



Recent Changes to the Family and Medical Leave Act

A Mandatory Reference for ADS Chapter 481

Reference Issuance Date: 10/05/2011
Policy Issuance Date: 06/24/2010
Responsible Office: HR/PPIM
File Name: 481mac_100511

This policy provides interim guidance on recent changes to the Family and Medical Leave Act (FMLA), (Public Law 111-84, October 28, 2009) in accordance with the National Defense Authorization Act (NDAA) for Fiscal Year 2010. Since the changes to the law became effective upon the date of enactment (October 28, 2009), the U.S. Office of Personnel Management (OPM) is issuing interim guidance to assist agencies until final regulations are issued.

The following guidance summarizes key changes to the FMLA that apply to Federal employees who are family members of military servicemembers. This guidance covers section 565(b) of the NDAA for Fiscal Year 2010 that amends the FMLA entitlements for Federal employees under 5 U.S.C. 6381-6383.

1. FMLA Leave for a Qualifying Exigency

a. Section 565(b)(1) of the Act provides a new entitlement to "qualifying exigency leave" for Federal employees covered by OPM's FMLA regulations that parallel the entitlement provided to employees covered by the Department of Labor's (DOL's) FMLA regulations.

b. Section 565(b)(1) also provides employees with an entitlement of up to 12 administrative workweeks of unpaid FMLA leave during any 12-month period for any qualifying exigency involving the spouse, son, daughter, or parent of the employee on covered active duty (or notified of an impending call or order to covered active duty) in the Armed Forces.

c. An employee may use qualifying exigency leave intermittently or on a reduced leave schedule. An employee may substitute annual or sick leave, as appropriate, for unpaid qualifying exigency leave. When the need for qualifying exigency is foreseeable, the employee must provide reasonable and practicable notice to the employing agency.

d. The law adds a definition of "covered active duty" at 5 U.S.C. 6381(7) to mean duty of a member of a regular component of the Armed Forces during deployment to a foreign country, and duty of a member of a reserve component of the Armed Forces to a foreign country under a call or order to active duty under a provision of law referred to in 10 U.S.C. 101(a) (13)(B).

e. The law provides that an agency may require that a request for qualifying exigency leave be supported by a certification issued "at such time and in such manner as the Office of Personnel Management may by regulation prescribe."

2. Qualifying Exigency Leave Use

In accordance with 5 U.S.C. 6387, OPM is required to prescribe regulations consistent, to the extent appropriate, with the regulations prescribed by the Secretary of Labor to carry out title I of the FMLA. On November 18, 2008, the Department of Labor issued

its implementing regulations for the military FMLA amendments including qualifying exigency leave for primarily private sector, state and local government employees.

In its interim guidance, OPM outlined portions of the DOL regulations that specify when qualifying exigency leave may be used. The following list is not intended to be all inclusive but provides examples of appropriate uses. Any reference to "a military member" should be read as a member of the Armed Forces covered by the definition of "covered active duty."

Qualifying exigency leave may be used for the following reasons:

- * Short-notice deployment
- * Military events and related activities
- * Childcare and school activities
- * Financial and legal arrangements
- * Counseling
- * Rest and recuperation
- * Post-deployment activities
- * Additional activities

Explanations of the various reasons for which qualifying exigency leave may be used are found on OPM's Web site at:

<http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=2884>.

3. Certification for Qualifying Exigency Leave

Until OPM issues specific regulations, Federal agencies are instructed to require the employee to provide his or her military active duty orders or other documentation issued by the military that indicates that the covered military member is on covered active duty or call to covered active duty status. The employee must also provide the dates of the covered military member's active duty service.

An employing agency may require that leave for any qualifying exigency be supported by a certification from the employee that provides the following information:

* A statement or description signed by the employee of appropriate facts regarding the qualifying exigency for which FMLA leave is requested. The facts must be sufficient to support the need for leave. Such facts must include information on the type of qualifying exigency for which leave is requested and any available written documentation which supports the request for leave. (For example, 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.)

* The approximate date on which the qualifying exigency began or will begin;

- * If an employee requests leave because of a qualifying exigency for a single, continuous period of time, the beginning and ending dates for such absence;
- * If an employee requests leave because of a qualifying exigency on an intermittent or reduced schedule basis, an estimate of the frequency and duration of the qualifying exigency; and
- * If the qualifying exigency involves meeting with a third party, appropriate contact information for the individual or entity with whom the employee is meeting (such as the name, title, organization, address, telephone number, fax number, and email addresses) and a brief description of the purpose of the meeting.
- * In requesting FMLA leave for qualifying exigencies, employees are instructed to use the Department of Labor's Optional Form (Form WH-384) located at: <http://www.dol.gov/whd/forms/WH-384.pdf>. This optional form reflects certification requirements that permit the employee to furnish the necessary information to support his or her request for leave due to a qualifying exigency.

4. FMLA Leave to Care for a Covered Servicemember

Section 565(b) of the Act expanded the coverage for the 26-week entitlement for family members to care for a covered servicemember undergoing medical treatment, recuperation, or therapy for a serious injury or illness. The new provision also expanded the definitions of "covered service member" and "serious injury or illness."

Section 565(b)(2) adds veterans to the definition of "covered servicemember" in 5 USC 6381(8). Previously, employees had an entitlement to FMLA leave to care for a covered servicemember only to care for a spouse, son, daughter, parent, or next of kin who was a current member of the Armed Forces. Now employees also have an entitlement to FMLA leave to care for a spouse, son, daughter, parent or next of kin when such relative is a veteran of the Armed Forces.

Employees are now entitled to 26 administrative workweeks of FMLA leave during a single 12-month period to care for certain family members who are veterans and who are undergoing medical treatment, recuperation, or therapy, for a serious injury or illness. The veteran must have been a member of the Armed Forces (including the National Guard or Reserves) during the five years preceding the medical treatment, recuperation, or therapy.

"Covered servicemember" is now defined as a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in an outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness. Section 565(b)(3) expands the definition of "serious injury or illness" at 5 U.S.C. 6381(11) to add conditions existing

prior to active duty that were aggravated by active duty and to include provisions related to "serious injury or illness" for veterans.

Additional information on the new FMLA provisions may be found at:

<http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=2884>.

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