

## FINAL FMLA REGULATIONS ISSUED

On November 17, 2008, the Department of Labor (DOL) issued final Family Medical Leave Act (FMLA) regulations providing some significant changes to FMLA requirements. While many of these changes were reflected in the proposed regulations released last year, there are some new requirements and timeframes. The final regulations are effective January 16, 2009. This article highlights some of the changes under the final regulations. The article is broken into three sections: Overview of the Major Changes, Summary of the Regulations (including General FMLA Provisions and the New Military Leave Requirements) and a Conclusion.

Generally, FMLA applies to private employers with 50 or more employees, public agencies and public and private elementary and secondary schools. Covered employers will need to review these regulations and update FMLA policies, notices and procedures to comply with the new requirements.

### SIGNIFICANT CHANGES

- The five-year break in service rule in the proposed regulations (for purposes of determining FMLA eligibility) has been changed to a seven-year period in the final regulations.
- The definition of a serious health condition has been changed to include certain timeframes around provider visits.
- Some clarification is provided with respect to intermittent leave.
- Significant modifications have been made to the existing rules on employer and employee notices to better facilitate communication and understanding of FMLA rights and responsibilities.
- Change in who may contact a health care provider for purposes of clarification or authentication of a medical certification – no direct supervisor contact with the health care provider.
- Effective January 28, 2008, FMLA was amended to include two new leave provisions, Military Caregiver Leave and Qualifying Exigency Leave. The final regulations provide guidance on providing these new types of leave to employees.

### SUMMARY OF THE REGULATIONS

#### 1. General Provisions under the Final Regulations

##### OVERVIEW

##### Joint Employers & PEOs

The final regulations address circumstances where a Professional Employer Organization (PEO) may be considered a joint employer with a client employer for purposes of FMLA. Such instances

depend on the economic realities of the situation and are based on all the facts and circumstances. A PEO does not enter into a joint employment relationship with a client employer when it merely performs administrative functions (e.g. benefits, payroll, regulatory paperwork, and updating employment policies). However, to the extent the PEO has the right to hire, fire, assign or direct and control the client's employees or benefits from work that the employees may perform, this may lead to a determination the PEO is a joint employer based on all the facts and circumstances.

#### Eligible Employee – Seven Year Break in Service Rule

In order to be eligible for FMLA leave an employee must be employed by the employer for at least 12 months. The current regulations indicate that those 12 months need not be consecutive. The final regulations place parameters around this definition. For purposes of counting 12 months of employment an employer will need to consider any service performed by the employee prior to a seven-year break in service. This is an increase from the five-year break in service requirement under the proposed regulations. Any service performed after a seven-year break may be disregarded unless the break in service was:

- the result of the fulfillment of the employee's National Guard or Reserve Military obligation, or
- pursuant to a written agreement, including a collective bargaining agreement, where the employer intends to re-hire the employee after a break in service.

Note, employers may wish to recognize prior employment beyond the seven-year period for FMLA eligibility. Any such favorable treatment must be applied uniformly for all employees.

#### Eligible Employee – Satisfaction of Eligibility Requirements While on Non-FMLA Leave

The final rule clarifies that an employee may become FMLA eligible while on a "non-FMLA" leave. In such cases, the period of leave after satisfaction of the eligibility requirement may be treated as FMLA leave (assuming all other requirements are satisfied). The time prior to meeting the eligibility requirements remains non-FMLA leave.

#### Serious Health Condition – Continuing Treatment

Current regulations define a *serious health condition* as a period of incapacity of more than three days combined with treatments from a health care provider on two or more occasions. There is no timeframe for receiving those treatments. Under the final rule, the two treatments must be received within *thirty days* of the first day of incapacity unless extenuating circumstances exist<sup>1</sup>. The final rules also require that the first visit to the health provider occur within *seven days* of the initial incapacity.

#### Serious Health Condition – Chronic Treatment

Under the final regulations for a chronic condition to qualify as a serious health condition the employee must make *at least two visits per year* to a health care provider for treatment of the condition. The current regulations have no visit requirement.

---

<sup>1</sup> *Extenuating circumstances* means circumstances beyond the employee's control that prevent a follow-up visit from occurring as planned by the health care provider. Determination of whether circumstances are extenuating is based on all the facts. The regulations provide an example of when the health care provider determines a follow-up is needed within 30 days but has no available appointments in that timeframe.

### Needed to Care for a Family Member

The final regulations clarify the employee does not need to be the only individual able to care for the family member or covered servicemember. The employee may share in the care responsibilities or provide a substitute for others who normally care for the family member.

### Health Care Provider

The final regulations broaden the definition of health care provider to include physician's assistants.

### Holidays

The final rule clarifies that when a holiday occurs within a week taken as FMLA leave; the entire week is counted as FMLA leave. However, if an employee is using FMLA leave in increments of less than a one week period, the holiday will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled to work during the holiday.

### Intermittent Leave

FMLA rules permit the use of intermittent or reduced schedule leave under certain circumstances; generally when it is medically necessary due to a serious health condition or upon the birth of a child, when agreed to by the employer. Intermittent or reduced schedule leave may also be used for qualifying exigencies and to care for a covered servicemember (see discussion below).

When scheduling intermittent or reduced schedule leave, the final rule requires employees to make a "reasonable effort" (as opposed to an "attempt" under the current rules) to schedule FMLA leave so as not to disrupt unduly the employer's business operation.

Generally, the employee must account for FMLA leave using an increment no greater than the shortest period of time that the employer uses to account for other forms of leave (but no greater than one hour and provided that the employee's FMLA entitlement may not be reduced by more than the amount of leave actually taken).

### Substitution of Paid Leave

Generally, FMLA leave is unpaid. However, the employee may elect (or the employer may require) substitution of accrued paid leave. This means the accrued paid leave will run concurrent with FMLA leave. The employer must inform the employee of the use of paid leave (whether employee elected or employer required) and inform the employee of any procedural requirements of the paid leave policy. Such disclosure is made in the Rights and Responsibilities Notice and Designation Notice (discussed below).

### Waiver of Rights

An employee cannot waive, nor may an employer induce employees to waive, prospective FMLA rights. The final regulations do permit employees to voluntarily settle their FMLA claims without court or DOL approval.

### Perfect Attendance Awards & Bonuses

If a bonus or other payment is based on the achievement of a specific goal (e.g. hours worked, products sold, or perfect attendance) and the employee has not met the goal due to FMLA leave, the payment or award may be denied provided such a bonus or award is not paid to an individual on an equivalent leave status that is non-FMLA.

## Light Duty

The time the employee works in a light duty position while recovering from a serious health condition does not count against FMLA leave entitlement. Also, acceptance of a light duty position does not constitute a waiver of the employee's right to be restored to the same (or equivalent) position the employee held at the time of the FMLA leave. However, the right to restoration ceases at the end of the applicable FMLA period.

## **EMPLOYER NOTICE OBLIGATIONS**

The notice obligations are consolidated into one section under the final regulations. The final rule imposes new requirements on employers with respect to these notices. The DOL has model notices available in the regulations and should be making these notices available on their website at a later date.

### General Notice

The General Notice of FMLA rights needs to be both posted and disseminated to individual employees.

#### *Posted Notice*

The final regulations retain the posted notice requirement and require every covered employer to post (and keep posted) the General Notice in a conspicuous place on its premises, regardless of whether the employer has any FMLA eligible employees.

Electronic posting of the General Notice is permissible under the final rule provided it otherwise meets the requirements and all employees and applicants for employment have access to the information.<sup>2</sup> However, using electronic posting does not alleviate the statutory obligation to post the notice in a location viewable to applicants for employment.

The final regulations increase the penalty for willful violation of the posting requirement from \$100 to \$110 for each separate offense.

#### *Individual Notice*

The final regulations also require that the employer include the General Notice in an employee handbook or other written material provided to employees concerning their employee benefits or leave rights. If no such written material exists, the employer must distribute a copy of the General Notice to each new hire upon employment. This is a change from the current rule that only requires an employer to advise employees of FMLA rights and responsibilities after they request FMLA leave.

Employers may meet the General Notice requirement by using the DOL sample notice or, at a minimum, including all the information that is contained in the sample notice in their materials. Employers with a significant portion of their workforce literate in a non-English language will need to provide the poster and individual notice to employees in a language in which they are literate.

---

<sup>2</sup> The employer may distribute this Poster and Individual Notice electronically, provided all of the following requirements are met:

- The information is accessible to all employees of the employer,
- That it is made available to employees not literate in English, and
- The information provided includes at a minimum the information contained in the DOL prototype notice.

Employers may also provide this notice electronically consistent with the requirements of the regulations.

There is a revised sample General Notice available in the final regulations (*WH Publication 1420 – see Appendix C in the regulations*).

#### Eligibility Notice

When the employee requests FMLA leave (or the employer acquires sufficient knowledge to determine the leave requested is FMLA qualifying) the employer must provide the employee with an Eligibility Notice within five business days (absent extenuating circumstances).

The notice must state whether the employee is eligible for FMLA leave. The employer must inform an employee if they are not eligible for leave. The regulations require the employer to state at least one reason why the employee is not eligible (e.g. employee did not satisfy the eligibility requirement; the employee exhausted FMLA leave for the 12-month period).

Notification may be oral or written, and the DOL provides a sample notice (*Form WH-381 – see Appendix D in the regulations*).

#### Rights & Responsibilities Notice

If the employee is determined to be eligible for FMLA leave, the employer is required to provide a specific notice of the employee's rights and responsibilities under FMLA and the consequences of failing to meet those obligations. This notice is provided at the same time as the Eligibility Notice.

This notice must include all of the following, as appropriate:

- that the leave may be designated and counted against annual FMLA leave entitlement and the 12-month period for FMLA entitlement;
- any requirements for the employees to furnish a certificate of a serious health condition or serious injury illness, or qualifying exigency arising out of active duty or a call to active duty, and the consequences for failing to do so;
- employee's right to substitute paid leave, any employer requirement that paid leave be substituted, conditions related to the substitution and right to take unpaid leave if employee does not qualify for paid leave;
- any requirements for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments, and the possible consequences for failing to make those payments on a timely basis (i.e. circumstances where coverage may lapse);
- the employee's status as a key employee and any potential consequences including that restoration may be denied and the conditions required for such a denial (if applicable);
- right to maintenance of benefits during leave and job restoration upon return; and
- employee's potential liability for payments of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave.

If specific information contained in the Rights & Responsibilities Notice changes, the employer shall provide written notice to the employee within five business days of the change.

The sample notice (*Form WH-381 – see Appendix D of the regulations*) from the DOL incorporates both the Rights & Responsibilities Notice and Eligibility Notice in one single document.

## Designation Notice

The employer is responsible in all circumstances for designating leave as qualifying for FMLA and for providing the employee with notice of such designation. When the employer has enough information to determine the leave as FMLA qualified, the employer must notify of the employee of the designation within five business days (absent extenuating circumstances). This is a change from the current two-day requirement. Also, the employer may provide the designation notice immediately if the employer is able to make such a determination after receiving notice from the employee. At the time of designating the leave as FMLA qualified, the employer must also inform the employee if any paid leave will be used during the FMLA period.

If the leave is determined to be a non-FMLA eligible (e.g. the leave is not for an event covered by the FMLA), the employer must notify the employee of that designation (including the employer's reasoning).

If the employer requires a fitness for duty certification to return to work after a FMLA leave, the employer must provide notice of this requirement in the Designation Notice. If the fitness for duty certification addresses the employee's ability to perform essential functions of the employee's position, the employer must include a list of those essential functions. There is a limited exception to this requirement where the handbook or other written policy contains information that a fitness for duty certification will be required in certain instances; the employer is not required to provide written notice but must provide oral notice no later than the Designation Notice.

If the amount of leave time is known, the employer will need to notify the employee of the amount of time that is counted against the employee's FMLA (hours, days or weeks). If the amount of time needed is unknown (e.g. unforeseeable leave) the employer will need to provide the employee a notice of the amount of leave counted against the employee's FMLA entitlement upon request.

The Designation Notice must be written and a prototype notice is available from the DOL (*Form WH-382 – see Appendix E of the regulations*).

## Retroactive Designation

An employer may retroactively designate leave as FMLA leave with appropriate notice to the employee provided that the employer's failure to timely designate leave does not cause harm or injury to the employee. The employer and employee may also mutually agree that leave may be retroactively designated as FMLA leave in all cases where FMLA protection would apply.

## Remedies

If the employer's failure to timely designate leave causes the employee to suffer harm, it may constitute an interference with, restraint of, or denial of the exercise of an employee's FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief including employment, reinstatement, promotion, or any other relief tailored to the harm suffered.

## **EMPLOYEE NOTICE REQUIREMENTS**

While the employee does not need to expressly assert rights under FMLA (or even mention FMLA), the employee must provide sufficient information for the employer to reasonably determine whether the FMLA may apply to the particular leave request. Failure to explain the reason for leave may result in a denial of leave.

## Foreseeable Leave & Unforeseeable Leave

When leave is foreseeable, notice must be provided to the employer at least 30 days in advance of the leave. If 30-day notice is not practicable (i.e. change in circumstances, medical emergency) notice must be given as soon as practicable.

When leave is unforeseeable, the employee must provide notice as soon as practicable under the facts and circumstances of the particular case. The final regulations clarify that it should generally be practicable for the employee to provide notice of unforeseeable leave within the timeframe of the employer's usual and customary practices, absent unusual circumstances. Such usual and customary practices include calling a designated phone number or contacting a specific individual. In situations requiring emergency treatment, the employee would not be required to follow usual and customary procedures until the situation stabilizes and he or she has access to a telephone. Notice may also be provided to the employer by the employee's spokesperson (e.g. a spouse, adult family member or other responsible party) if the employee is unable to do so.

Notice may be oral or written. Employee should provide information sufficient to make the employer aware of the need for FMLA qualifying leave and the anticipated timing and duration of the leave. Among other things, such notice may include a statement that the condition renders the employee unable to perform the functions of their job, that the employee is pregnant or has been hospitalized overnight. Calling in "sick" without providing more information will not be sufficient notice to trigger FMLA rights. The employer will be expected to obtain any additional required information in order to make a determination through informal means. The employee has an obligation to respond to questions from the employer designed to determine whether the absence qualifies for FMLA protection. Failure by the employee to respond to reasonable employer inquiries may result in the denial of FMLA protection if the employer is unable to determine whether the leave is FMLA qualifying.

## **CERTIFICATION**

### Certification – Serious Health Condition

An employer may require that an employee provide certification to support the need for FMLA leave when leave is needed for the employee's own or a family member's serious health condition. An employer must give written notice of the certification requirement to the employee. The employer should provide this notice when the employee gives notice of the need for leave or within five business days. In the case of unforeseen leave, the employer should provide this notice within five business days of that leave. The employee has fifteen days to provide the certification to the employer unless it is not practicable under the facts and circumstances despite the employee's diligent, good faith efforts.

The employee must provide a complete and sufficient certification. If the certification is incomplete or insufficient the employer shall notify the employee in writing stating what additional information is necessary to make the certification complete.<sup>3</sup> The employee has seven days to cure any deficiencies.

The DOL provides two revised optional certification forms (*Form WH-380-E and Form WH-380-F*) for use in obtaining medical certification, including second and third opinions. Form WH-380-E is the form for the employee's own serious health condition and Form WH-380-F is for the serious health condition of a covered family member. The model forms follow the requirements of the regulations for requesting certification. Either the model forms or alternative forms requesting the

---

<sup>3</sup> An *insufficient certification* contains entries that have not been completed. An incomplete certification is a certification where the information is vague, ambiguous or non-responsive.

same basic information may be used by the employer. In no circumstances may the employer require more information on the medical certification than what is specified in the regulations. Further, information contained on the form may only relate to the serious health condition for which the current need for leave exists.

The employer may require the employee provide a new medical certification annually in the case where the serious health condition of the employee or family member lasts beyond a single leave year.

Samples of the above forms are available in the regulations (*see Appendix B of the regulations*).

#### Interaction between FMLA Certification and ADA Inquiries

FMLA does not prevent the employer from following procedures under Americans with Disabilities Act (ADA) for requesting medical information. Any information received pursuant to these procedures may be considered in determining FMLA leave entitlement of the employee.

#### Authentication and Clarification of a Medical Certification

An employer may contact the health care provider for purposes of clarification and authentication of the medical certification after the employer has given the employee the opportunity to cure any deficiencies.<sup>4</sup> No information beyond what is contained in the certification may be requested.

A change from the proposed regulations allows the employer to use a health care provider, human resource professional, leave administrator or management official to contact the health care provider. However, **under no circumstances may the employee's direct supervisor contact the employee's health care provider.**

When information regarding an employee is shared with an employer by a HIPAA covered health care provider, the requirements of the HIPAA privacy rule must be satisfied.

#### Recertification

An employer may request a recertification no more than every 30 days and only in connection with an absence of the employee. Where the certification indicates that the duration of the condition is more than 30 days, an employer must wait until the expiration of that minimum duration before requesting a recertification. However, in all cases the employer may request a recertification of a medical condition every six months.

An employer may request recertification in less than 30 days if:

- Employee requests an extension of leave
- Circumstances described by the previous certification have changed significantly (e.g. changes to the duration or frequency of the leave or the nature or severity of the illness);  
or
- If the employer receives information that casts doubt on the stated reason for the absence or the continued validity of the certification.

Recertification must be provided by the employee within fifteen calendar days of the employer's request unless it is not practicable under the particular circumstances given the employee's diligent, good faith efforts.

---

<sup>4</sup> *Authentication* means providing the health care provider with a copy of the certification and requesting verification of the information contained on the certification was completed by the health care provider who signed the documents. *Clarification* means contact the health care provider to understand the handwriting on the certification or to understand the meaning of a response.

For purposes of the recertification, the employer may request the same information that was provided on the medical certification. The same obligations apply to the employee on the recertification as they did for the initial medical certification. The employer may provide the health care provider with a record of the employee's absence pattern and ask the provider if the employee's absence pattern is consistent with the nature of the serious health condition and need for leave.

#### Fitness for Duty Certification

The employer may require, a certification from the health care provider that the employee is able to resume work. If the employer adopts such a policy, it must be applied uniformly to all similarly situated employees (i.e. same occupation, same serious health condition). This certification may also specifically address the employee's ability to perform the essential function of their job provided such a requirement was disclosed in the Designation Notice (discussed above).

For intermittent or reduced schedule leaves, the employer is not entitled to a certification of fitness for duty for each absence. However, the employer is entitled to such a certification once every thirty days if reasonable safety concerns exist.

## **2. New Military Leave Requirements**

On January 28, 2008, the President signed into law the National Defense Authorization Act of 2008 (NDAA), amending the statutory provisions of FMLA for the first time in 15 years. Employers subject to FMLA must now comply with two additional leave provisions: Military Caregiver Leave and Qualifying Exigency Leave. The final regulations provide the first guidance on these new leave provisions.

### **MILITARY CAREGIVER LEAVE**

An eligible employee who is the *spouse, son, daughter, parent, or next of kin* of a *covered servicemember* shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for the *servicemember* who is undergoing medical treatment, recuperation, or therapy, or is otherwise in *outpatient status* or on the temporary disability retired list for a serious injury or illness.

Employers were required to comply with the Military Caregiver Leave effective January 28, 2008.

#### Definitions

*Covered Servicemember* is a current member of the Armed Forces, including a member of the National Guard or Reserves (or a member of the Armed Forces, the National Guard or Reserves who is on the temporary disability retired list), who incurred a serious illness or injury in the line of duty for which he or she is undergoing medical treatment, recuperation, or therapy, or is in outpatient status or on the temporary disability retired list. A *covered servicemember* does not include former members of the Armed Forces, National Guard and Reserves, and members on the permanent disability retired list.

*Serious Illness or Injury* is an injury or illness incurred in the line of duty that may render the servicemember medically unfit to perform the duties of his/her office, grade, rank or rating.

*Outpatient status* means the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient; or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

*Son or Daughter of a Covered Servicemember* means the covered servicemember's biological, adoptive or foster child, stepchild, legal ward or a child for whom the covered servicemember stood *in loco parentis*<sup>5</sup>, and who is of **any age**. The "any age" definition is broader than the definition used for non-military FMLA entitlements.

*Parent of a Covered Servicemember* means the biological, adoptive, step or foster parent, or any other individual who stood *in loco parentis* to the employee when the employee was a *son or daughter*. The term does not include parents-in-law.

*Spouse* is a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including common law marriage in states where it is recognized. However, the Defense of Marriage Act (DOMA) definition of a spouse controls for purposes of FMLA, therefore, a spouse may only be a person of the opposite sex who is a husband or a wife.<sup>6</sup> Same-sex spouses are likely not spouses under the FMLA definition.

*Next of Kin of a Covered Servicemember* is the nearest blood relative to the covered servicemember other than the parent, spouse, son or daughter. The regulations provide a list of who may be considered "*next of kin*":

- Blood relatives who have been granted legal custody of the covered servicemember;
- Brothers & sisters;
- Grandparents;
- Aunts and uncles;
- And first cousins; *unless*
- The covered servicemember has specifically designated another blood relative as the nearest blood relative for purposes of the Military Caregiver Leave under FMLA.

When there is no designation made by the covered servicemember and multiple family members exist within the same relationship level (e.g. multiple brothers and sisters), all such family members are treated as the next of kin for purposes of FMLA leave. Assuming they are otherwise FMLA eligible, those family members may take FMLA leave to care for the covered servicemember either simultaneously or consecutively.

#### Single 12-month Period

An eligible employee is entitled to 26 workweeks of FMLA leave during a single 12-month period to care for a seriously ill or injured covered servicemember.

Regardless of the method used by the employer to calculate the 12-month period of other FMLA leave entitlements, the 12-month period associated with Military Caregiver Leave is counted from the date the employee takes leave and ends 12 months from that date.

The leave entitlement applies on a per-injury, per-servicemember basis. An eligible employee may take more than one 26 week leave period provided the leave is taken in a new 12-month period and the leave is to care for (a) a different covered servicemember or (b) the same covered servicemember with a subsequent serious illness or injury.

#### Coordination with Other Leave Entitlements

An eligible employee is entitled to a combined total of 26 workweeks of leave for any FMLA qualifying reason during the single 12-month period provided that the employee is entitled to no more than 12 weeks of leave for all non-Military Caregiver Leave entitlements (e.g., birth of a son

---

<sup>5</sup> *In loco parentis* – Those persons with day-to-day responsibility to care for and financially support of a child or, in the case of the employee, the person with such responsibility when the employee was a child. No biological or legal relationship is necessary.

<sup>6</sup> See *FMLA-98*, November 18, 1998, <http://www.dol.gov/esa/whd/opinion/FMLA/prior2002/FMLA-98.htm>

or daughter, adoption of a son or daughter, care for covered family member's serious health condition, care for the employee's own serious health condition, or qualifying exigency).

Thus, during the single 12-month period, an eligible employee may take 16 weeks of FMLA leave to care for a covered servicemember and 10 weeks of FMLA leave to care for a newborn child. However, FMLA does not entitle an employee to 16 weeks of leave to care for a newborn child and 10 weeks to care for the covered servicemember. In this example, the 16 weeks exceeds the 12 week leave period for the care of a newborn.

Employers may be more generous than FMLA in their leave policies.

### Intermittent Leave

Eligible employees may take intermittent leave or a reduced leave schedule if necessary to care for the covered servicemember. This includes instances where the condition is intermittent as well as cases where the employee is only needed intermittently, for example where other care is normally available at certain times or in a shared responsibility arrangement. The employee need not be the only individual able to care for the covered servicemember.

### Certification

Employers may (but are not required to) seek certification from an employee requesting FMLA leave.

#### *Required Information from a Health Care Provider*

When leave is taken to care for a seriously ill or injured covered servicemember, an employer may require the employee obtain a certification completed by the covered servicemember's authorized health care provider. Any one of the following health care providers may provide a certification:

- United States Department of Defense (DOD) health care provider;
- United States Department of Veterans Affairs health care provider;
- A DOD TRICARE network authorized private health care provider; or
- A DOD non-network TRICARE authorized health care provider.

The employer may request the health care provider provide the following information:

- Name, address and contact information (telephone/fax number, or email address) of the health care provider, the type of medical practice, the medical specialty and whether the provider is one of the health care providers listed above;
- Whether the serious illness or injury of the covered servicemember was incurred in the line of duty;
- The approximate date on which the serious illness or injury commenced and its probable duration;
- A statement or description of appropriate medical facts regarding the covered servicemember's condition for which leave is requested. Facts must be sufficient to support the need for leave, and must include information on:
  - whether the injury or illness renders the servicemember medically unfit to perform the duties of the servicemember's office, grade, rank or rating, and
  - whether the member is receiving medical treatment, recuperation or therapy;
- Information sufficient to establish the covered servicemember is in need of care and whether the care is needed for a single continuous period of time (including time for treatment and recovery) and an estimate as to the start and end dates of this timeframe;
- If the employee is requesting intermittent leave or a reduced leave schedule, the provider should indicate whether there is medical necessity for such periodic care and an estimate of the treatment schedule of such appointments; and

- If the employee is requesting intermittent leave or a reduced leave schedule to care for the covered servicemember other than for planned medical treatment (e.g. episodic flare-ups of the medical condition), information should be provided regarding whether there is medical necessity for the covered servicemember to have such periodic care, which may include assisting the servicemember in recovery, and an estimate of the frequency and duration of such periodic care.

#### *Required Information from the Employee and/or Covered Servicemember*

In addition to the information that may be requested from the health care provider, and employer may also request the following information be provided by the employee and/or covered servicemember:

- The name and address of the employer of the employee requesting leave to care for the covered servicemember, the name of the employee requesting leave and the name of the covered servicemember for whom the employee is requesting leave;
- The relationship of the employee to the covered servicemember;
- Whether the covered servicemember is a current member of the Armed Forces, National Guard or Reserves, and the servicemember's military branch, rank, and current unit assignment;
- Whether the covered servicemember is assigned to a military medical facility as an outpatient or to a unit established to provide outpatient care to members of the Armed Forces (such as a medical hold or warrior transition unit) and the name of the facility or unit;
- Whether the covered servicemember is on temporary disability retired list; and
- A description of the care to be provided to the covered servicemember and the estimate of the leave needed to provide the care.

#### *Documentation of Relationships*

The employer may require an employee to provide reasonable documentation or a statement of family relation. This may take the form of a simple statement from the employee, a birth certificate of the child, a court document, etc. The employer may examine documentation, but the employee is entitled to the return of any official document submitted for this purpose.

#### *Sample Form*

The DOL has developed an optional form (*Form WH-385 – see Appendix H of the regulations*) for employees to use in obtaining a certification that meets the FMLA requirements. Employees may use this form or another form requesting the same basic information. In no circumstances may the employer require more information than what is required in the regulations.

#### *Verification*

An employer may seek authentication and/or clarification of the certification. However, second and third opinions are not permitted. Also, recertifications are not permitted.

#### *ITOs & ITAs*

Also, Invitational Travel Orders (ITOs) and Invitational Travel Authorizations (ITAs) are sufficient certification for purposes of providing this leave. ITOs and ITAs are issued to any family members to join an injured or ill servicemember at his or her bedside. The employer may not require any additional certification by the employee providing an ITO or ITA, except a confirmation of the employee's family relationship to the seriously injured or ill servicemember. A simple statement of the relationship is sufficient for this confirmation.

### *Failure to Provide Certification*

If the certification is required by the employer, it is the employee's responsibility to provide a complete and sufficient certification. Failure to do so may result in a denial of FMLA leave.

### Designation

As with all FMLA leaves, the employer is responsible for designating the leave as FMLA qualifying, paid or unpaid, and for providing notice of the designation to the employee consistent with the regulations (i.e. within the five-day timeframe). A Military Caregiver Leave may also qualify as leave to care for a covered family member's serious illness. In such instances, employers must designate the leave under the terms most beneficial to the employee, meaning the leave is treated as a Military Caregiver Leave with 26 weeks of leave. Retroactive designation is permissible consistent with the regulations.

### **QUALIFYING EXIGENCY LEAVE**

An eligible employee may take a total of 12 weeks of FMLA leave for any *qualifying exigency* arising out of the fact that the *spouse, son, daughter or parent* of the employee is on *active duty* or has been notified of an impending *call or order to active duty* in the Armed Forces in support of a *contingency operation*.

This leave provision did not become effective until the issuance of the final regulations; however, the Department of Labor (DOL) encouraged employers to provide this leave in the interim. It appears the requirements of the qualifying exigency leave are effective November 17, 2008, otherwise such provisions are effective on January 16, 2008.

### Definitions

*Covered Military Member* means the employee's spouse, son, daughter or parent who is on active duty or called to active duty status.

*Active Duty or Call to Active Duty Status* means duty under a call or order to active duty (or notification of an impending call or order to active duty) in support of a *contingency operation*.<sup>7</sup> The orders of a military member will generally specify whether such member is serving in support of a contingency operation by citation to the relevant section in Title 10 of the United States Code or by reference to the specific name of the operation. The call or order to active duty must be a Federal call or order. State calls or orders do not apply unless by order of the President.<sup>8</sup>

*Son or Daughter on Active Duty or Call to Active Duty Status* means the employee's biological adopted or foster child, stepchild, legal ward or child for whom the employee stood *in loco parentis*<sup>9</sup>, who is on active duty or called to active duty status and who is of **any age**.

*Parent* means a biological, adoptive, step or foster father or mother, or any other individual who stood *in loco parentis* to the employee when the employee was a son or daughter as defined above. This term does not include parents "in law."

---

<sup>7</sup> *Contingency Operation* means a military operation that:

- is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations or hostilities against an enemy of the United States or against opposing military forces, or
- results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10 of the United States Code, chapter 15 of Title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress. *10 U.S.C. 101(a)(13)*.

<sup>8</sup> See *29 CFR 825.126(b)(2)* for specific references to Title 10.

<sup>9</sup> *In loco parentis* – see Footnote 1.

*Spouse* has the same definition as discussed under Military Caregiver Leave (*see above*).

### Eligibility

Employees are eligible to take this leave if they otherwise satisfy the requirements for FMLA eligibility and the covered military member is on active duty or called to active duty status in support of a contingency operation. Generally this requires that the covered military member is either a member of the reserve components<sup>10</sup> or a retired member of the Regular Armed Forces or Reserves.

**The qualifying exigency leave is not available to an employee with a family member on active duty or called to active duty status as a member of the Regular Armed Forces.**

### Leave Entitlement – Qualifying Exigency

Eligible employees may take up to 12 weeks of FMLA leave in a 12-month period while the covered military member is on active duty or called to active duty status for one of the following “qualifying exigencies”:

#### *Short-notice Deployment*

- Address issues that arise when a covered military member is notified of an impending call or order, and deployment is within seven days of notification.
- Leave is limited to seven calendar days beginning the date the covered military member is notified of an impending call or order to active duty.

#### *Military Events and Related Activities Associated with the Call or Order to Active Duty*

- Attend official ceremony, programs or events sponsored by the military; and
- Attend family support assistance programs and information briefings sponsored by the military, military service organization, or the Red Cross.

#### *Childcare and School Activities*

- Arrange alternative childcare when the order/call to active duty necessitates a change in the existing childcare arrangement;
- Provide childcare on an urgent immediate need basis (but not on a routine, regular or everyday basis);
- Enroll in or transfer to a new school or day care facility as necessary; and
- Attend meetings with staff at a school or daycare (e.g. disciplinary meetings, parent teacher conferences, school counselors) when meetings are necessary due to circumstances arising out of the call or order to active duty.

The child care provisions relate to children of the covered military member under age 18 or over 18 if incapable of self-care because of physical or mental disability at the time the FMLA commences.

#### *Financial and Legal Arrangements*

- Make and update financial and legal arrangements to address the covered military member’s absence (e.g. preparing financial and health care powers of attorney, transferring bank account signature authority, enrolling in Defense Enrollment Eligibility Reporting System, obtaining military identification cards, or preparing or updating a will);
- Act as the covered military member representative before federal, state or local agency for purposes of obtaining, arranging or appealing military benefits.

---

<sup>10</sup> Army National Guard, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard, Air Force Reserve or Coast Guard Reserve.

### *Counseling*

- Attend counseling, provided the need for counseling arises out of the active duty or call to active duty;
  - Pertains to the employee's own counseling or that of a child of the covered military member. A "child" is the covered military member's own child under age 18 or over 18 if incapable of self-care because of a physical or mental disability.

### *Rest and Recuperation*

- To spend time with a covered military member who is on short-term, temporary rest and recuperation leave during a period of deployment;
- Employee is limited to five days of leave for each instance of rest and recuperation leave the covered military member receives.

### *Post-deployment Activities*

- Includes attending welcome home ceremonies, reintegration briefings and events, and other official ceremonies or programs sponsored by the military for a period of 90 days following the termination of the covered military member's active duty status; and
- To address issues arising out of the death of a covered military member while on active duty.

### *Additional Activities where the Employer and Employee Agree to the Leave*

- Employers and employees are free to agree to other reasons for leave to qualify as an exigency arising out of a covered military members call or order to active duty status. Employers and employees should agree on the timing and duration of such leave.

### Certification

The first time an employee requests a qualifying exigency leave, an employer may require the employee to provide a copy of the covered military member's active duty orders or other documentation issued by the military which indicates that the covered military member is on active duty or a call to active duty in support of contingency operations and the dates of the active duty service. This information only needs to be provided to the employer once. However, a copy of new active duty orders may be requested by the employer when a different active duty or call to active duty status occurs.

### *Required Information*

Employers may require that the employee provide a certification for leave taken as a result of a qualifying exigency. The certification may contain all of the following:

- Statement or description, signed by the employee, of appropriate facts regarding the qualified exigency. The facts need to be sufficient to support the leave. This includes information on the type of qualifying exigency and any available documentation to support the request (e.g. copy of a meeting announcement for informational briefings sponsored by the military, document confirming an appointment with a counselor or school official, copy of a bill for legal or financial services);
- Approximate date the qualified exigency commenced or will commence;
- For a continuous leave, the expected start and end dates;
- For intermittent leave, an estimate of the frequency and duration of the qualifying exigency; and
- If the exigency involves meeting with a third party, the appropriate contact information of the third party (e.g., name, address, telephone number, fax, email) and a brief description of the purpose of the meeting.

### *Documentation of Relationships*

The employer may require an employee to provide reasonable documentation or a statement of family relationship. This may take the form of a simple statement from the employee, a birth certificate of the child, a court document, etc. The employer may examine documentation, but the employee is entitled to the return of any official document submitted for this purpose.

### *Sample Form*

The DOL developed an optional form (*Form WH-384 – see Appendix G of the regulations*) for employees to use in obtaining a certification that meets requirements under the regulations. The employer may use this form or another form requesting the same basic information. In no circumstances may the employer require more information than what is required in the regulations.

### *Failure to Provide Certification*

If the certification is required by the employer, it is the employee's responsibility to provide a complete and sufficient certification. Failure to do so may result in a denial of FMLA leave.

### *Verification*

If the employee submits a complete certification to support their qualifying exigency leave, the employer may not request additional information. However, when the leave involves meeting with a third party, the employer may contact the individual or entity with whom the employee is meeting for purposes of verifying the meeting or appointment schedule and the nature of the meetings. No employee permission is necessary. The employer may not request additional information from the third party. The employer may also contact the DOD to request verification of the covered military member's active duty or call to active duty status. Again, no additional information may be requested from the DOD.

## **CONCLUSION**

As the regulations are effective January 16, 2009, employers will want to review their FMLA leave policies and update notices and handbooks to reflect the changes to FMLA, including the new military leave provisions. At this time, the DOL-provided forms discussed above are only available in the regulations. However, the DOL should be posting them to their website in the near future. For more information on FMLA, visit the DOL's Wage and Hour division website at <http://www.dol.gov/esa/whd/>.

A copy of the final regulations is available at <http://edocket.access.gpo.gov/2008/pdf/E8-26577.pdf>

### *Disclaimer Statement:*

These materials are produced by Kibble & Prentice for educational purposes only. Certain information contained in these materials is considered proprietary information created by Kibble & Prentice and/or their licensed and appointed insurance carriers. Such information shall not be used in any way, directly or indirectly, detrimental to Kibble & Prentice and/or their affiliates.

Neither Kibble & Prentice nor any of its respective representatives or advisors has made or makes any representation or warranty, expressed or implied, as to the accuracy or completeness of these materials. Neither Kibble & Prentice nor their respective representatives or advisors shall have any liability resulting from the use of these Materials or any errors or omission therein. These materials provide general information for the use of our clients, potential clients, or that of our clients' legal and tax advisors.

IRS Circular 230 Disclosure: Kibble & Prentice Holding Co. and its affiliates do not provide tax advice. Accordingly, any discussion of U.S. tax matters contained herein (including any attachments) is not intended or written to be used, and cannot be

used, in connection with the promotion, marketing or recommendation by anyone unaffiliated with Kibble & Prentice Holding Co. of any of the matters addressed herein or for the purpose of avoiding U.S. tax-related penalties. Also, the information contained in this document should not be construed as medical or legal advice.

Copyright © 2008 Kibble & Prentice Holding Company. All Rights Reserved.