

Amendments to the Family and Medical Leave Act

Sara C. Craven
Policy Analyst
DAS/HRD, Policy Development

Background

- US Department of Labor issued final regulations on November 17, 2008
- Adds in military family leave amendments and revises current FMLA regulations
- Effective on January 16, 2009

Agenda

- Explanation of amended FMLA regulations
- Explanation of the new military leave family regulations
- Question and Answer

Basic Leave Entitlement

- Pregnancy, prenatal care or child birth
- Birth or Adoption
- Family member's serious health condition
- EE's serious health condition

Pregnancy, prenatal care or birth

- Care for pregnant spouse who has severe morning sickness or other complications
- May also be used to accompany her to prenatal doctors' appointments
- Not available to a non-spouse father of the child (e.g. boyfriend or fiancé)

Serious Health Condition

- Very few changes to definition
- Treatment by Health Care Provider
 - EE's first (or only) treatment must occur within seven days of first day of incapacity
 - Must occur w/in 30 days of first day of incapacity
- Chronic Conditions
 - "Periodic visits" = at least twice a year

Serious Health Condition Question

- January 3—George awakes to find his skin covered with itchy red bumps.
- January 6— Diagnosed with chicken pox. Told to remain off work until bumps go away. Schedules a follow-up appointment.
- January 28—Follow-up exam. Can return to work at any time without restrictions.
- Does George have a “serious health condition” that would qualify him for FMLA?

Serious Health Condition Answer

- Yes.
- George had the requisite two treatments pursuant to doctor’s orders within the appropriate time frames and was told by his physician that he couldn’t work until the bumps went away (a period of more than three days).

Employee Eligibility

- Entitled to FULL amount even if spouse has exhausted leave for a qualifying event
- 1,250 hour test
 - Applied at beginning of all intermittent absences
 - Entitled to leave for that reason, even if 1,250 hour calculation isn't met at some later point

1,250 Hours Example #1

- April: MS Condition
 - EE has worked 1,275 hours
- July: MS Condition
- Entitled to FMLA leave without having to re-qualify under the 1,250 hour test.

1,250 Hours Example #2

- April: MS Condition
 - EE has worked 1,275 hours
- July: Hysterectomy
 - EE hasn't worked 1,250 hours
- Eligible for MS but not for surgery.

Timing of EE's Notice

- In case of foreseeable leave, 30 days advanced notice is required.
- If leave is unforeseeable, EE must give notice of the need "as soon as practicable"
 - Look to agency's normal call-off procedures
 - One hour before start of shift is "reasonable"

Content of EE's Notice

- Must provide sufficient information for ER to determine whether FMLA applies
 - Qualifying reason, timing and duration
 - Calling in "sick" is not enough
- Subsequent absences for same FMLA-reason must reference qualifying reason or state "FMLA" leave

General Notice

- FMLA poster must be posted in a conspicuous place
- Distribute in a handbook or materials that are distributed to all EEs and applicants
- May be distributed in hard copy, electronically or both

Eligibility Notice

- Notify in writing of eligibility or *non-eligibility* within 5 business days
- Notice must state:
 - Whether EE is eligible
 - If not eligible, at least one reason why not
- Exhausting 12-weeks is not a reason for “ineligibility”

Rights and Responsibilities Notice

- Provide at same time as *Notice of Eligibility* and again if any information changes
- State’s form includes both

Designation Notice

- Whether leave qualifies as FMLA
- Amount of leave counted as FMLA

Failure to Designate Leave

- *Ragsdale* case
- Retroactive designation is permitted if ER fails to timely designate leave as FMLA
- May be liable if EEs can show they suffered harm as a result of the failure to designate

Failure to Designate Example

- August: 12 weeks for birth of second child
- Pre-August: 2 weeks for mom's condition
 - ER didn't notify that this leave counted as FMLA
- If EE can show that he would have made other arrangements for care of his mother had he known that it would be counted as FMLA, the 2 weeks may not count against his FMLA entitlement.

Notice Requirements Question #1

- April 1—EE calls one hour before start
- April 3—*Notice of Eligibility and Rights and Responsibilities* and *Certification of HCP for Family Member's Serious Health Condition* are sent
- April 8—EE returns certification
- April 10—*Designation Notice*
- FMLA on ePay screen every pay period.
- Did Mary's agency comply with the FMLA's new notice requirements?

Notice Requirements Answer #1

- Timing/Content of Mary's Notice: Look at agency's usual and customary policy on leave notification. Provides enough info for agency to know FMLA is triggered.
- Eligibility Notice: 5 days after EE requests leave.
- Rights & Responsibilities Notice: Included with eligibility notice.
- Designation Notice: 5 days of acquiring the certification. Amt of FMLA leave used is being relayed through her pay stub (ePay).

Notice Requirements Question #2

- Same facts as Question #1.
- May 1 – “The pollen is high today and Molly's asthma is acting up again.”
- Is Mary's notice in compliance?
- What notice does agency need to send?

Notice Requirements Answer #2

- Timing/Content of Mary's Notice: sufficient notice.
- Eligibility Notice: Not needed
- Rights & Responsibilities Notice: Not needed
- Designation Notice: Not needed, but agency should continue to relay amount taken through her pay stub (ePay)

Initial Medical Certifications

- Four new medical certifications
 - EE's Serious Health Condition
 - Family Member's Serious Health Condition
 - Qualifying Exigency
 - Serious Illness or Injury of Covered Servicemember
- EE has 15 days to provide complete and sufficient certification

Curing Medical Certifications

- Incomplete or insufficient
 - “Incomplete” – one or more entries is not completed
 - “Insufficient” –vague, ambiguous or non-responsive
- Curing the Certification
 - Specify the information needed to make the certification complete and sufficient
 - Allow EE seven calendar days to return

Authenticating/Clarifying

- ER may authenticate and clarify certification
 - “Authenticate” –verify info was completed by HCP
 - “Clarify” –understand handwriting or meaning
- Can only use ER’s own HCP, HR Professional, leave administrator, or management official
- HIPAA requirements must be satisfied

Recertifications

- Recert at any time if:
 - EE requests an extension of leave
 - Circumstances have changed significantly
 - Leave taken is inconsistent with circumstances described
- If minimum duration of condition is more than 30 days, must wait until that duration expires.
- In all cases, ER may request a recertification every 6 months in connection with an absence.

Recertification Example #1

- 6 weeks for cancer operation and treatment
 - Medical certification on file for 6 weeks
 - Don't ask for a recertification during 6 weeks.
- 2 more weeks for additional treatment
 - Okay to ask for recertification for the 2 weeks.

Recertification Example #2

- 8 weeks for a back operation and therapy
 - Medical certification on file for 8 weeks.
 - Don't ask for a recertification during 8 weeks.
- 3 days per month for therapy
 - Okay to request a recertification.
- Six months later, and in connection with an absence, may ask for a recertification.

Use of FMLA Leave

- Physical Impossibility Rule – if impossible to start in middle of shift, entire period may count as FMLA
- Holidays
 - Full week, holiday counts against EE's FMLA
 - Increments of less than a week, holiday doesn't count against FMLA unless EE was otherwise scheduled and expected to be at work

Use of FMLA Leave (cont)

- Overtime –OT hours required to work but for FMLA condition may be counted
- Outside Employment – prohibited while on FMLA without approval from HR office
- Use of Comp Time – required to exhaust all comp time prior to going on unpaid FMLA

Military Family Leave Provisions

- Qualifying Exigency Leave
- Military Caregiver Leave

Qualifying Exigency Leave

- Purpose: to allow an employee who has a spouse, son, daughter, or parent in the National Guard or Reserves to take FMLA due to a qualifying exigency resulting from the covered family member's active military duty (or call to active duty status) in support of a contingency operation

General

- "Active duty" must be federal active duty.
- "Regular armed forces" not eligible
- Counts against EE's 12-week leave entitlement.
- Regular EE and ER notice requirements apply.
- Special definition of "son/daughter"
- Call-up orders will indicate whether EE is serving in support of contingency operation

List of Qualifying Exigencies

- Short notice deployment
- Military events and related activities
- Childcare and related activities
- Financial and legal arrangements
- Counseling
- Rest and recuperation
- Post-deployment activities
- Any other event that the EE and ER both agree on

Summary of Qualifying Exigencies

- Short notice deployment
 - Deployment on seven or fewer days of notice
 - Leave for seven days from date of notification
- Military events and related activities
 - Official ceremonies, programs, events, family support or assistance programs, and information briefings
 - Sponsored by military, military services organizations or American Red Cross

Summary of Qualifying Exigencies

- Childcare and related activities
 - Arranging for alternative childcare, childcare on non-routine, urgent, immediate need basis
 - Enrolling or transferring a child in a new school or day care facility
 - Attending certain meetings at a school or a day care

Summary of Qualifying Exigencies

- Financial and legal arrangements
 - Making or updating financial and legal arrangements to address a covered military member's absence
- Counseling
 - Someone other than HCP for oneself, covered military member, or child of covered military member
- Rest and Recuperation
 - 5 days of leave to spend time with a military member on short-term rest and recuperation leave during deployment

Summary of Qualifying Exigencies

- Post-deployment activities
 - Arrival ceremonies, reintegration briefings and events, and other official military ceremonies or programs
 - Period of 90 days following termination of covered military member's active duty status
 - Addressing issues arising from death
 - "Yellow Ribbon Reintegration Program"
- Any other event that EE and ER agree is a qualifying exigency

Certifications

- Proof of military EE's active duty status
 - Copy of active duty order and dates of service
 - Proof of covered family relationship
 - May verify with appropriate DOD unit
- Proof of exigency
 - Signed statement of facts; not affidavit
 - Verification w/third party of meeting date or appointment
- Recertifications are NOT permitted

Qualifying Exigency Question

- January 1 – Brad’s active duty notice
- January 3 – Deployment date
- January 1-8 – Angelina takes week off work
- February/March
 - Meeting with school officials
 - Meeting with military support group
 - Meeting with military chaplain
- April – Brad’s two-week furlough
- Which absences are covered by the FMLA?

Qualifying Exigency Answer

- Week off work @deployment: Short-notice deployment. 7th day after Brad was deployed. Ok for any purpose.
- Meeting w/school officials: Childcare and related activities. Disciplinary measures.
- Family Team Building meetings: Military events and related activities. Program sponsored by military.
- Meeting w/military chaplain: Counseling. Provided by someone other than a HCP
- Brad’s military furlough: Rest and Recuperation. Capped at five days.

Military Caregiver Leave

- Purpose: to allow an employee to take up to 26 weeks of leave to care for a spouse, child, parent, or next of kin who incurred an injury or illness in the line of active duty

General

- Employees in “regular armed forces” ARE eligible for the leave.
- Does not include retired or former servicemembers.
- Regular EE/ER notice requirements apply.
- Designate as military caregiver leave first.

“Next of Kin”

- Nearest blood relative in the following order:
 - Blood relative designated in writing as “next of kin”
 - Blood relatives granted legal custody
 - Brothers/Sisters
 - Grandparents
 - Aunts/Uncles
 - First Cousins
- Family members at same level may take FMLA leave to provide care to servicemember.

Next of Kin Question #1

- Brady Family
 - Two brothers
 - Three sisters
 - Dad
 - Step-mother
 - Housekeeper Alice
 - Cousin Oliver
- Suppose Bobby has not designated a blood relative to provide care, who is eligible?

Next of Kin Answer #1

- Dad and step-mother are eligible as parents of a covered servicemember
- Brothers and sisters are included as “next of kin”
- Cousin Oliver is included by law as “next of kin”

Next of Kin Question #2

- Suppose Bobby specifically designates cousin Oliver as his “next of kin,” who would be eligible to take the leave?

Next of Kin Answer #2

- Dad and step-mother would be eligible as parents of a covered servicemember
- Cousin Oliver is the only member eligible as “next of kin”

Next of Kin Question #3

- Can Bobby specifically designate Alice the housekeeper as his “next of kin?”

Next of Kin Answer #3

- No. The regulations only allow a servicemember to specifically designate a blood relative as a “next of kin.”

Certifications

- Certifications on Form
 - Certification of military status
 - Certification of relationship
 - Certification of a serious injury or illness
 - Auto-Certifications
- No second or third opinions
- No recertifications

Amount of Leave

- 26 weeks during a single 12-month period
- 12-month period begins first day EE takes leave and ends 12 months after that date
- Remaining time is forfeited
- Available once per servicemember, per injury
- Total of 26 weeks for any FMLA-qualifying reasons during the single 12-month period

Military Caregiver Examples

- Example 1:
 - Injured during first deployment
 - Separate injury during second deployment
 - Entitled to two separate 26 weeks during separate "single 12-month periods"
- Example 2:
 - Injured leg and arm during first deployment
 - Entitled to a single 26 week entitlement

Military Caregiver Examples

■ Example 3:

- Injures leg and sister takes 26 weeks
- Serious aggravation and complications occur next year
- Not entitled to an additional 26 weeks of leave

■ Example 4:

- Serious injury and sister takes 16 weeks.
- Sister has baby in July.
- Sister has 10 weeks to care for newborn.

Military Caregiver Examples

■ Example 5:

- Serious injury and sister takes 8 weeks.
- Sister has baby in July.
- Sister has 12 weeks to care for newborn.

■ Example 6:

- January: Bobby has serious injury and sister takes 26 weeks.
- September: Peter has serious injury.
- Sister not eligible to take a second 26 weeks of leave.

Important Information

- DAS/HRD Policy Website: www.ohio.gov/hrpolicy
- DOL Website:
www.dol.gov/esa/whd/fmla/finalrule.htm
- Final Regulations:
www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763

Office of Policy Development
DASHRD.HRPolicy@das.state.oh.us
(614) 752-5393