



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

The Director

MAR 5 2010

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

**FROM: JOHN BERRY
DIRECTOR**

Subject: Recent Changes to the Family and Medical Leave Act

On December 26, 2009, the U.S. Office of Personnel Management (OPM) issued CPM 2009-26 (<http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=2703>) informing agencies of several changes in Federal employee pay and leave entitlements resulting from the enactment of the National Defense Authorization Act for Fiscal Year 2010 (Public Law 111-84, October 28, 2009) (hereafter referred to as "the Act"). Part of this memorandum outlined changes made to the Family and Medical Leave Act (FMLA) provisions for families of military servicemembers.

Since the changes to the statute were effective upon the date of enactment (October 28, 2009), OPM is issuing interim guidance to assist agencies until OPM can issue final regulations. This memorandum addresses only section 565(b) of the Act that amends the FMLA entitlements for Federal employees at 5 U.S.C. 6381-6383. In summary, this portion of the legislation (1) provides a new entitlement to qualifying exigency leave for Federal employees covered by OPM's FMLA regulations parallel to the entitlement provided to employees covered by the Department of Labor's (DOL's) FMLA regulations and (2) expands 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 by amending the definitions of "covered servicemember" and "serious injury or illness."

For both entitlements, the individuals for whom an employee can take FMLA leave are specified in statute.

Additional Information

For additional information, agency Chief Human Capital Officers and/or Human Resources Directors should contact their assigned OPM Human Capital Officer. Employees should contact their agency's human resources office for assistance.

Attachment

cc: Chief Human Capital Officers
Human Resources Directors

FMLA Guidance Related to the National Defense Authorization Act for Fiscal Year 2010

Description

The National Defense Authorization Act (NDAA) for Fiscal Year 2010 (Public Law 111-84, October 28, 2009) (hereafter referred to as “the Act”), made several significant changes to the Family and Medical Leave (FMLA) entitlements for Federal employees covered by the U.S. Office of Personnel Management’s (OPM’s) FMLA regulations. Since the changes to the statute were effective upon the date of enactment (October 28, 2009), OPM is issuing interim guidance to assist agencies until we can issue final regulations.

This attachment covers only section 565(b) of the Act that amends the FMLA entitlements for Federal employees at 5 U.S.C. 6381-6383; it is organized into two parts to capture the different entitlements provided by this Act. In summary, the primary changes reflect (1) the addition of “qualifying exigency leave” for Federal employees covered by OPM’s FMLA regulations, to parallel the entitlement provided to employees covered by the Department of Labor’s (DOL’s) FMLA regulations and (2) the expansion of 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 by amending the definitions of “covered servicemember” and “serious injury or illness.”

Part I: FMLA Leave for a Qualifying Exigency

Section 565(b)(1) of the Act adds a new subsection (a)(1)(E) to 5 U.S.C. 6382 to provide employees with an entitlement of up to 12 administrative workweeks of unpaid FMLA leave during any 12-month period for any qualifying exigency arising out of the fact that the spouse, son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.

A. Application of Qualifying Exigency Leave

The law—

- provides that an employee may use qualifying exigency leave intermittently or on a reduced leave schedule.
- permits an employee to substitute annual or sick leave, as appropriate, for unpaid qualifying exigency leave.
- provides that when the need for qualifying exigency leave is foreseeable, the employee must provide reasonable and practicable notice to the employing agency.
- 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 county under a call or order to active duty under a provision of law referred to in 10 U.S.C. 101(a)(13)(B).

- 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”.

B. 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. DOL was given the authority for qualifying exigency leave under the National Defense Authorization Act for Fiscal Year 2008 and on November 18, 2008 issued its implementing regulations for the military FMLA amendments, including qualifying exigency leave for private sector, state and local government and some Federal employees (29 CFR Part 825, (<http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763>)). To expedite use of this new entitlement, OPM is outlining portions of the DOL regulations that provide when qualifying exigency leave may be used. This 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. To address any issue that arises from the fact that a military member is notified of an impending call or order to covered active duty 7 or fewer calendar days prior to the date of deployment.

Military events and related activities

- To attend any official ceremony, program, or event sponsored by the military that is related to the covered active duty or call to covered active duty status.
- To attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the covered active duty or call to covered active duty status.

Childcare and school activities

- To arrange for alternative childcare when the covered active duty or call to covered active duty status necessitates a change in the existing childcare arrangement for a biological, adopted, or foster child, a stepchild, or a legal ward of a military member, or a child for whom a military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence.
- To provide childcare on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the need to provide such care arises from the covered active duty or call to covered active duty for a biological, adopted, or foster child, a stepchild, or a legal ward of a military member, or a child for whom a military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence.
- To enroll in or transfer to a new school or day care facility a biological, adopted, or foster child, a stepchild, or a legal ward of the military member, or a child for whom the military

member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence, when enrollment or transfer is necessitated by the covered active duty or call to covered active duty status.

- To attend meetings with staff at a school or a daycare facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with school counselors, for a biological, adopted, or foster child, a stepchild, or a legal ward of the military member, or a child for whom the military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status.

Financial and legal arrangements

- To make or update financial or legal arrangements to address the military member's absence while on covered active duty or call to covered active duty status, such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), obtaining military identification cards, or preparing or updating a will or living trust.
- To act as the military member's representative before a Federal, state, or local agency for purposes of obtaining, arranging, or appealing military service benefits while the military member is on covered active duty or call to covered active duty status, and for a period of 90 days following the termination of the military member's covered active duty status.

Counseling. To attend counseling provided by someone other than a health care provider for oneself; for the military member; or for the biological, adopted, or foster child, a stepchild, or a legal ward of the military member, or a child for whom the military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence; provided in all cases that the need for counseling arises from the covered active duty or call to covered active duty status.

Rest and recuperation. To spend time with a military member who is on short-term, temporary, rest and recuperation leave during the period of deployment.

Post-deployment activities

- To attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the military member's covered active duty status.
- To address issues that arise from the death of a military member, such as meeting and recovering the body of the military member and making funeral arrangements.

Additional activities

- To address other events which arise out of the military member's covered active duty or call to covered active duty status provided that the employing agency and employee agree that

such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

C. Call or Order to Covered Active Duty Under a Provision of Law Referred to in 10 U.S.C. 101(a)(13)(B)

In order for an employee to be eligible to use qualifying exigency leave for a member of a reserve component of the Armed Forces, the reservist must be deployed under a call or order to active duty in a foreign country. Also, the call or order to active duty must be covered by one of the following specific provisions in title 10 of the United States Code: sections 688, 12301(a), 12302, 12304, 12305, or 12406, chapter 15 (which includes sections 331, 332, and 333), or any other provision of law during a war or national emergency declared by the President or Congress. (Such service is “covered” active duty: the specific provisions are synopsisized below.) Covered active duty for a member of a reserve component of the Armed Forces does not include voluntary active duty under 10 U.S.C. 12301(d) or annual training duty under 10 U.S.C. 10147 or 12301(b).

- Section 688 authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service;
- Section 12301(a) authorizes ordering all reserve component members to active duty in the case of war or national emergency;
- Section 12302 authorizes ordering any unit or unassigned member of the Ready Reserve to active duty;
- Section 12304 authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty;
- Section 12305 authorizes the suspension of promotion, retirement or separation rules for certain Reserve components;
- Section 12406 authorizes calling the National Guard into Federal service in certain circumstances; and
- Chapter 15 authorizes calling the National Guard and state military into Federal service in the case of insurrections and national emergencies.

D. Certification for Qualifying Exigency Leave

Until specific regulations are issued by OPM, Federal agencies are instructed to use the information outlined below to determine whether the employee qualifies for this type of leave.

Active duty orders. The first time an employee requests leave because of a qualifying exigency arising out of the covered active duty or call to covered active duty status of a covered military member, an employing agency 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 covered active duty or call to covered active duty status, and the dates of the covered military member’s active duty service. This information need only be provided to the employing agency once. A copy of new active duty orders or other documentation issued by the military must be provided to the employing agency if the need for

leave because of a qualifying exigency arises out of a different covered active duty or call to covered active duty status of the same or a different covered military member.

Required information. An employing agency may require that leave for any qualifying exigency as provided for in 5 U.S.C. 6382(a)(1)(E) 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 should include information on the type of qualifying exigency for which leave is requested and any available written documentation which supports the request for leave; such documentation, for example, 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 commenced or will commence;
- 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 e-mail address) and a brief description of the purpose of the meeting.

Certification form. For employees covered by DOL's FMLA regulations, DOL has developed an optional form (Form WH-384) for employees' use in obtaining a certification that meets the qualifying exigency certification requirements. (See <http://www.dol.gov/whd/forms/WH-384.pdf>.) Federal agencies may choose to use this form as a guide in administering FMLA leave for qualifying exigencies for their employees. This optional form reflects certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave because of a qualifying exigency. Form WH-384, or another document containing the same basic information, may be used by the employing agency. It should be noted that Form WH-384 contains citations to DOL's regulations on it, which are not the applicable authority for Federal employees governed by OPM's FMLA authorities.

Part II: FMLA Leave to Care for a Covered Servicemember

This portion of the guidance refers to 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, and the amendment of the definitions of "covered servicemember" and "serious injury or illness." Section 565(b) of the Act amended the title 5 FMLA authorities to broaden the scope of the coverage that was provided in section 585(b) of the NDAA for FY 2008. OPM issued a memorandum (CPM-2008-04, see <http://www.opm.gov/oca/compmemo/2008/2008-04.asp>) on the earlier statute on February 1, 2008. After DOL issued its final regulations implementing the NDAA for FY 2008 statutory entitlements on November 17, 2008, OPM issued proposed regulations on August 26, 2009 (74 FR 43064, found at

<http://edocket.access.gpo.gov/2009/pdf/E9-20610.pdf>). The Act was enacted after the issuance of OPM's proposed regulations and contained changes which will have a broad impact on the FMLA leave to care for a covered servicemember entitlement and will necessitate changes to the proposed regulations. In the interim, OPM is publishing this guidance to assist employees and employing agencies in understanding and using the FMLA leave to care for a covered servicemember entitlement.

A. Section 585(b) (NDAA for FY 2008) – FMLA Leave to Care for a Covered Servicemember

Section 585(b) of the NDAA for FY 2008 amended the Family and Medical Leave Act (FMLA) provisions in 5 U.S.C. 6381-6383 (applicable to Federal employees) to provide military family leave entitlements for a Federal employee who (1) is the spouse, son, daughter, parent, or next of kin (defined as the nearest blood relative) of a covered servicemember with a serious injury or illness and (2) provides care for such servicemember.

- The serious illness or injury must have been incurred by the covered servicemember in the line of duty while on active duty in the Armed Forces.
- Covered family members are entitled to up to 26 weeks of FMLA leave during a single 12-month period to care for the servicemember (hereafter referred to as “leave to care for a covered servicemember”).
- During the single 12-month period, the employee is entitled to a combined total of 26 weeks of regular FMLA leave and FMLA leave to care for a covered servicemember. For example, if during the single 12-month period an employee wants to take 6 weeks of regular FMLA leave for the birth of a child, as well as FMLA leave to care for a covered servicemember, the 6 weeks of regular FMLA leave would be subtracted from the combined entitlement of 26 weeks, leaving the employee with 20 weeks of leave to care for a covered servicemember.
- The use of this leave to care for a covered servicemember in a single 12-month period does not limit the use of regular FMLA leave during any other 12-month period. For example, if an employee uses 26 weeks of FMLA leave to care for a covered servicemember during a single 12-month period but has not used any regular FMLA leave during that period, the employee would still be entitled to use up to 12 weeks of regular FMLA leave immediately following the single 12-month period.
- Similar to regular FMLA leave, FMLA leave to care for a covered servicemember is unpaid leave for which an employee may substitute any accumulated annual or sick leave. However, the normal leave year limitations on the use of sick leave to care for a family member do not apply; an employee may substitute annual or sick leave for any part of the 26-week period of unpaid FMLA leave to care for a covered servicemember.

B. Section 565(b) (NDAA for FY 2010) New and Revised Definitions Affecting FMLA Leave to Care for a Covered Servicemember

The new and revised definitions affecting the NDAA for FY 2008 FMLA legislation are as follows:

Covered servicemember. Section 565(b)(2) of the Act adds veterans to the definition of “covered servicemember” in 5 U.S.C. 6381(8) and creates a 5-year look-back period for these veterans, as outlined below. The new definition reads as follows:

the term “covered servicemember” means—

- (1) 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; or
- (2) a veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.

Veteran. Section 565(b)(3) adds a definition of “veteran” to 5 U.S.C. 6381(12), which states that a “veteran” is defined under 38 U.S.C. 101. Under section 101, “[t]he term ‘veteran’ means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.”

Serious injury or illness. Section 565(b)(3) of the Act expands the definition of “serious injury or illness” at 5 U.S.C. 6381(11) for the purposes of FMLA leave to care for a covered servicemember, 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.

C. Impact on 26 Week FMLA Entitlement to Care for a Covered Servicemember:

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 (care for a covered servicemember) to care for a spouse, son, daughter, parent, or next of kin when such relative is a veteran of the Armed Forces.

- In the case of a member of the Armed Forces (including a member of the National Guard or Reserves), “serious injury or illness” means an injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member’s active duty and was aggravated by service in line of duty on active duty in the Armed Forces) and that may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating.
- In the case of a veteran who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period 5 years preceding the date on which the veteran undergoes medical treatment, recuperation, or therapy, “serious injury or illness” means an injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member’s active duty and was aggravated by service in line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran.

Links

Recent Pay and Leave Legislative Changes, CPM 2009-26, 12/29/2009
(<http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=2703>)

Family and Medical Leave
(<http://www.opm.gov/oca/leave/HTML/fmlafac2.asp>)

Recent Pay and Leave Legislative Changes, CPM 2008-04, 2/1/2008
(<http://www.opm.gov/oca/compmemo/2008/2008-04.asp>)