

## **DOL Request for Comments on Family Leave in Connection with Injured Members of the Armed Forces and Qualifying Exigencies Related to Active Duty**

The National Defense Authorization Act for 2008 (NDAA) amended the FMLA to provide for leave to eligible employees of covered employers to care for covered service members and because of any qualifying exigency arising out of the fact that a covered family member is on active duty or has been notified of an impending call to active duty status. The provision for leave to care for an injured service member was effective January 28, 2007, the date the NDAA was signed. The provision for leave for qualifying exigencies is not effective until the Secretary of Labor issues regulations defining qualifying exigencies.

In the DOL's Notice of Proposed Rulemaking and Request for Comments, the DOL has included a description of the relevant military family leave statutory provisions, a discussion of issues the Department has identified, and a series of questions seeking comment on subjects and issues that may be considered in the final regulations. The DOL anticipates that its next step, after reviewing comments received in response to this NPR, will be issuance of final regulations interpreting the NDAA amendments.

***Definitions:*** The DOL is considering defining "active duty" and "contingency operation" in the regulations as those terms are defined in the NDAA and cross-referencing Title 10 of the U.S. Code, in which the Secretary of Defense has defined those terms.

***Undergoing Medical Treatment, Recuperation or Therapy:*** The DOL addressed the issue of what it means for a service member to be "undergoing medical treatment, recuperation, or therapy" for a serious illness or injury. According to the DOL, any treatment, recuperation, or therapy provided to a service member for a serious injury or illness, and not just that provided by the Armed Forces, should be covered.

The DOL seeks public comments on this issue and specifically whether there should be a temporal proximity between the covered service member's injury or illness and the treatment, recuperation, or therapy for which care is required. The DOL also seeks comments on whether it should rely on a determination by the Department of Defense (DOD) regarding whether a service member is undergoing medical treatment, recuperation or therapy for a serious injury or illness.

***Next of Kin:*** The DOL seeks comments on whether it should adopt the DOD's definition of next of kin (which lists eight different categories of individuals), whether a definition of "next of kin" that relies on differing state law interpretations is appropriate, and whether a certification of "next of kin" status should be required. The DOL also seeks public comments on the requirement in the NDAA that the next of kin be the "nearest" blood relative.

***Serious Injury or Illness:*** The DOL seeks comments on whether a certification from the DOD or Department of Veterans Affairs should be sufficient to establish whether a

service member has a serious injury or illness that was incurred by the member in the line of duty while on active duty status in the Armed Forces, as well as on other approaches to determining whether a service member has an injury or illness that may render him or her medically unfit. The DOL also seeks comments regarding whether the NDAA amendments permit an eligible employee to take leave to care for a service member whose injury or illness was incurred in the of duty but did not manifest itself until after the service member left military service.

***Qualifying Exigency:*** Among other things, the DOL seeks comments on the degree of nexus required to demonstrate that the exigency arises out of the service member’s active duty status. The DOL expressed the view that this leave should be for non-medical related exigencies and seeks comments on this issue and whether a list of pre-deployment, deployment and post-deployment exigencies should be developed. If so, the DOL seeks comments on whether the following types of should exigencies qualify:

- making arrangements for child care;
- making financial and legal arrangements to address the service member’s absence;
- attending counseling related to the active duty of the service member;
- attending official ceremonies or programs where the participation of the family member is requested by the military;
- attending to farewell or arrival arrangements for a service member; and
- attending to affairs caused by the missing status or death of a servicemember.

The DOL also seeks comments on whether there are other types of exigencies that should qualify.

***Definition of Son or Daughter:*** The DOL seeks comments on how son or daughter should be defined for the purposes of the military leave amendments and whether these definitions should be different from the way those terms are defined generally in the FMLA (i.e., son or daughter must be under the age of 18 or, if over the age of 18, incapable of self care).

***Single 12-month Period:*** The DOL seeks comments on how the “single 12-month period” should be measured for purposes of determining entitlement to leave to care for a covered service member and how to reconcile this period to the employer’s regular FMLA leave year if different periods are used.

***Whether 26 Weeks of Leave is Limited:*** The DOL also seeks comments on whether the 26 weeks of leave to care for a covered service member should be interpreted as a one-time entitled or a recurrent entitlement and whether an eligible employee is entitled to 26 weeks of leave per covered service member (for example, 26 weeks to care for an injured parent and 26 weeks to care for an injured spouse – in either the same or different twelve month periods) or whether the eligible employee is limited to 26 weeks while working for the same employer.

**Temporary Transfers:** The DOL seeks comments on whether it would be appropriate to permit temporary transfers when FMLA leave is taken on an intermittent or reduced leave schedule basis for a qualifying exigency.

**Notice:** The DOL stated that its initial view is that the notice requirements applicable to FMLA leave in general (30 days when the need for leave is foreseeable and as much notice as practicable when the need is unforeseeable) should apply to leave to care for a covered service member. The DOL seeks comments on whether it should incorporate leave to care for a covered service member into the notice provisions of proposed FMLA regulatory §§ 825.302 and 825.303.

Additionally, the DOL also takes the view that the same notice requirements generally applicable to FMLA leave should apply to leave for a qualifying exigency. If different notice requirements should be used, the DOL seeks comments on what should be required. Additionally, since leave for a qualifying exigency may not involve a medical condition, the DOL seeks comments on the type of information the employee should provide to the employer to make the employer aware that the employee's need for leave is FMLA-qualifying.

**Certification Requirements for Leave to Care for a Covered Service Member and Qualifying Exigency:** The military family leave provisions allow employers to apply the FMLA's existing medical certification requirements for serious health conditions to leave taken to care for a covered service member. These provisions also allow an employer to require certification (as prescribed by the Secretary of Labor) of leave taken for a qualifying exigency.

The DOL raised a number of issues upon which it seeks comments, including:

- Whether it is appropriate to interpret the FMLA's statutory certification requirements differently for purposes of leave taken to care for a covered service member and whether the clarification, authentication, and second and third opinion provisions and the recertification provisions applicable to FMLA leave in general should be applied to certifications supporting FMLA leave taken to care for a covered service member, and, if so, how?
- Whether it is appropriate to interpret the military family leave provisions to permit the employer to obtain certification from the service member's health care provider or military branch, when an employee seeks leave to care for the covered service member.
- Whether a medical certification to support leave taken to care for a covered service member issued by the DOD or Department of Veterans Affairs would eliminate the need to define a sufficient medical certification for purposes of taking leave to care for a covered service member and to develop a clarification, authentication, validation, and recertification process for leave taken for this purpose.

- Whether there should be different timing requirements that an employee must follow when providing certification from the DOL or Department of Veterans Affairs in support of a request for leave to care for a covered service member.

***Qualifying Exigency:*** With regard to leave for a qualifying exigency, the DOL seeks comments relating to the following issues:

- What type of information should be provided to support active duty status or a call to active duty and who may issue such a certification?
- Should the certification specify that the requested leave is a qualifying exigency or that it arises out of the covered service member's call to active duty or active duty in support of a contingency operation?
- Should an employee seeking FMLA leave due to a qualifying exigency provide certification of the qualifying exigency by statement or affidavit? Who else might certify that a particular request for FMLA leave is because of a qualifying exigency?
- Should the certification requirements for leave taken because of a qualifying exigency vary depending on the nature of the qualifying exigency?
- What timing should be applied to certification for leave taken for a qualifying exigency?
- Who should bear the cost of such certification?
- Should an employer be permitted to clarify, authenticate, or validate an active duty or call to active duty certification? Likewise, should an employer be permitted to clarify, authenticate, or validate a certification that a particular event is a qualifying exigency? If so, what limitations, if any, should be imposed on an employer's ability to seek such clarification, authentication, or validation for both types of certifications?
- Should a recertification process be established for certifications related to leave taken because of a qualifying exigency? If so, how would that process compare to the current FMLA recertification process?

***Maintenance of Health Benefits:*** The DOL seeks comments on how to appropriately implement the provisions of the family military leave amendments that permit the employer to recover premiums paid for maintaining the employee's group health plan coverage during the employee's leave if the employee does not return to work after the leave period has expired.

***Separate Regulations for Family Military Leave?*** The DOL seeks comments on whether family military leave entitlement should be incorporated into the FMLA's general regulatory scheme or whether stand-alone regulatory sections should be implemented for one or both of the military family leave provisions.

The DOL also seeks comments on whether the military family leave provisions should be incorporated into the FMLA poster and general notice or included in a separate poster and notice.

