



NEW FMLA AMENDMENTS CREATE “EXIGENCIES” FOR EMPLOYERS

(Editor’s Note: This is the first in a two-part series of articles published by Jones Walker’s Labor and Employment Practice Group on the military-family leave provisions in the Family and Medical Leave Act. Stay tuned for part two.)

The Louisiana Army National Guard’s 3,000-member 256th Infantry Brigade Combat Team is preparing for a 12-month deployment to Iraq. On January 6, 2010, the Louisiana National Guard held a deployment ceremony in White Castle, Louisiana, for its 256th Brigade Special Troops Battalion. The ceremony was reportedly attended by hundreds of family members and friends—and those family members were likely eligible for leave under the Family and Medical Leave Act’s new military leave provisions for their attendance at the deployment ceremony. The Battalion will train in Mississippi for six to eight weeks, after which they will have four days of leave to return home before flying to Iraq. Their family members may also be entitled to FMLA leave for that four-day leave period. In light of the increased troop deployments to Afghanistan and Iraq, it is critical for employers to understand the new military leave provisions of the FMLA.

While federal and state laws provide leave for and protect members of the military in their employment, in recognition of the importance of our military *families*, the Family and Medical Leave Act (“FMLA”) was amended in 2008 to add two separate types of military-family leave: (1) leave because of a “qualifying exigency” arising out of a family member’s active duty in the military; and (2) leave to care for a service member who was injured in the line of duty. These military leave provisions have already been expanded, pursuant to an October 2009 amendment to the FMLA.

This article addresses the scope and applicability of the FMLA’s military-family leaves, as originally enacted in 2008 and as amended in 2009, in two parts. This first part discusses the “Active Duty Family Leave,” with a focus on examples of “qualifying exigencies” that are covered by the Act. The second installment of this article will analyze the “Injured Service Member Leave,” with an emphasis on how this leave differs from the original FMLA leave to care for a family member with a serious health condition.

“Active Duty Family Leave” for a “Qualifying Exigency”

Effective January 16, 2009, the FMLA was amended to create what is sometimes called “Active Duty Family Leave,” allowing employees to take leave when they experience a “qualifying exigency” arising out of the fact that a family member has been called to active duty. This type of leave is similar to the original FMLA benefits in terms of the length of leave (12 weeks) and calculation of the 12-month period; however, a “qualifying exigency” is generally a non-medical event, placing an emphasis on the “family” in the Family and Medical Leave Act.

A. Which employees are eligible for “Active Duty Family Leave?”

As originally enacted on January 16, 2009, employees were eligible for “Active Duty Family Leave” if their spouse, parent(s), or son or daughter was a retired member of the regular Armed Forces, or a member of certain



reserve components of the Armed Forces, including, but not limited to, the National Guard, Retired Reserve, and Ready Reserve. Such employees are eligible for this leave when their military family member is on active duty, called to active duty (*i.e.*, notified of an upcoming call to duty, but not yet deployed), or retained on active duty.

Significantly, this leave did not initially apply to family members of the regular Armed Forces. The FMLA was amended on October 28, 2009, to extend “Active Duty Family Leave” to employees whose spouse, parent(s), or son or daughter is a member of the regular Armed Forces. However, under the 2009 amendments, an employee is only entitled to “Active Duty Family Leave” when the military family member—including both members of the regular Armed Forces and reserve components—is deployed to a foreign country or has been notified of an upcoming call to duty in a foreign country but not yet deployed.

B. What is a “qualifying exigency”?

While the original FMLA benefits allow individuals to take time off for the birth of a child or to care for a family member with a serious illness, Congress recognized that the deployment of a soldier is no less of a crisis and certainly puts new demands on families. Thus, a “qualifying exigency” is generally intended to be a non-medical event otherwise not covered by the FMLA. The Department of Labor has outlined seven categories of “qualifying exigencies”: (1) short-notice deployment, (2) military events and related activities, (3) childcare and school activities, (4) financial and legal arrangements, (5) counseling, (6) rest and recuperation, and (7) post-deployment activities. Other events that arise out of a family member’s call to active duty in the military, but which do not fall into one of these seven categories, may also be considered a “qualifying exigency” if the employer and employee agree that the leave shall qualify as exigency leave, and agree to both the timing and duration of such leave.

Because some of these categories appear to include routine family needs, it is important to note that these events only constitute a “qualifying exigency” when they **arise from** the military family member’s call to active duty. Thus, while an employee is normally not entitled to take FMLA leave to make childcare arrangements or to visit a bank for the purpose of drafting powers of attorney forms, such leave is a “qualifying exigency” if it is a direct result of the military family member’s call to active duty. More details of each of the seven categories of “qualifying exigencies” are as follows:

1. Short-notice deployment. If the military member receives notice of his call to active duty seven or less calendar days prior to the date of deployment, the employee may take up to seven days of leave to address any issue arising out of the short notice deployment. This leave starts on the date the military member receives notice of his deployment. For example, if an employee’s spouse receives notice on October 5 that he will be deployed to active duty on October 9, the employee would be eligible for leave from October 5–11 to make or update financial arrangements, to spend time with the military member, or for any other reason related to the call to duty.



2. Military events and related activities. Activities sponsored by the military, military service organizations, or the American Red Cross, and which relate to a military family member's active duty or call to active duty, are the type of activities intended to be covered by "Active Duty Family Leave." Thus, an employee may take leave to attend official arrival and departure ceremonies, pre-deployment briefings, briefings for the family during the period of deployment, and post-deployment briefings which occur while the employee's military family member is on active duty or has been called to active duty. The deployment ceremony in White Castle, Louisiana, discussed at the beginning of this article, is one example of a military event creating a "qualifying exigency" for eligible family members who attended.
3. Childcare and school activities. An employee may be entitled to take leave to attend to a broad array of childcare and school activities that require attention because the military family member is on active duty or call to active duty, rather than routine events that occur regularly for all parents. Examples of such covered leave include:
 - a. To arrange for alternative childcare, such as enrolling a child in summer day care if the military member is still on active duty, or to make new arrangements to transport a child to and/or from childcare when the military member is no longer present to do so. Notably, while leave is available to arrange for alternate childcare or transportation, it does not include leave to actually provide that childcare or transportation on a regular basis.
 - b. To provide childcare on an urgent, immediate need basis. For example, if an employee's grandson becomes sick and needs to be immediately picked up from daycare or school, but his mother (the employee's daughter) is deployed to a foreign country with the Armed Forces and cannot do so, then the employee could take leave to pick up her grandson and care for him in the short term, likely for that day and possibly the next day. However, if the child's illness continued and he needed to stay home multiple days, the employee would need to make alternative childcare arrangements.
 - c. To enroll the child in or transfer the child to a new school or day care facility due to the parent's active duty in the military. For example, if the employee's husband normally transports their child to and from school, but is called to active duty, the employee may take leave to enroll the child in a school closer to her office.
 - d. To attend meetings with school staff, such as meetings for disciplinary reasons, parent-teacher conferences, or meetings with school counselors that are necessary due to circumstances arising from the military member's active duty or call to active duty. This does not cover leave for meetings to address routine academic concerns. So, the employee may take leave to attend a special parent-teacher conference to address potential concerns arising out of the military family member's active duty, but may not take leave to attend a routine parent-teacher conference that all parents are requested to attend.



4. Financial and legal arrangements. An employee may take leave to make financial and/or legal arrangements, so long as the arrangements are necessitated by the military family member's call to active duty. Leave is not provided to cover routine matters such as paying bills. However, an employee could take leave to prepare and execute financial and healthcare powers of attorney, to transfer bank account signature authority, to open a joint checking account, to obtain military identification cards, or to prepare or update a will or living trust. Additionally, an employee may take leave to act as the military member's representative before a federal, state, or local agency for the purpose of obtaining military service benefits.
5. Counseling. A military member's deployment to active duty—particularly to such war-torn countries as Iraq or Afghanistan—may place significant mental stress on the family members he or she leaves behind. Although most counseling falls under the original FMLA leave for an employee's own serious health condition, this "qualifying exigency" is intended to cover counseling that is non-medical in nature. For example, military families may seek counseling from a pastor, military chaplain, the military, or a military service organization. If so, they are eligible for leave to attend such counseling alone or as a group, for himself, or for the military family member or the child of the military family member.
6. Rest and recuperation. An employee may be eligible for leave to spend time with the military family member who is home on short-term, temporary leave while on active duty, such as for rest and recuperation. The employee is eligible for up to five days of leave during each period of short-term, temporary leave afforded the military member. As discussed at the beginning of the article, eligible employees related to members of the Louisiana Army National Guard's 256th Brigade may take leave to spend time with the military members during their four-day leave between their training in Mississippi and their departure for Iraq.
7. Post-deployment activities. An employee may take leave to attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military. An employee may also take leave to address any issue arising from the death of the military member while on active duty, including meeting and recovering the body, and making funeral arrangements. Eligibility for leave due to post-deployment activities continues for a period of 90 days following the termination of the military member's active duty status.

C. How is "any 12-month period" calculated?

"Active Duty Family Leave" merely constitutes a fourth category of leave—for a "qualifying exigency"—under the same structure of the original FMLA leave benefits, including for the birth or adoption of a child, to care for a family member with a serious illness, or because of the employee's own serious illness. Therefore, the same rules apply for calculating the 12-month period for "Active Duty Family Leave" as for the original, well-known FMLA leave categories. The 12-month leave year may be measured by the calendar year, the employer's fiscal year, the employee's anniversary date, the date the employee first took leave covered under FMLA, or on a rolling period. As with the original FMLA leave, "Active Duty Family Leave" may be taken on an intermittent basis.



D. What kind of notice must the employee provide, and can an employer require certification?

If “Active Duty Family Leave” is foreseeable, the employee shall provide such notice to the employer as is reasonable and practical.

An employer may require the employee to provide a copy of the military family member’s active duty orders or other documentation issued by the military indicating that the military family member is on active duty, and the dates of the active duty service. While the employee may take leave for multiple “qualifying exigencies” arising out of the same deployment, the employer may only require certification of the military member’s active duty status once. For example, if an employee takes leave to attend her daughter’s military departure ceremony, the employer may request certification of the deployment; however, if the employee later takes leave to attend counseling with a military chaplain because of the same deployment, the employer may not request certification of the active duty a second time.

An employer may also require that leave for any “qualifying exigency” be supported by a certification from the employee that describes the facts regarding the “qualifying exigency” for which FMLA leave is requested, the date such leave is to start, the duration of such leave or an estimate of the frequency and duration of any intermittent leave, and, if the “qualifying exigency” requires the employee to meet with a third party (such as a school official, a bank employee, or a counselor), the identification of that third party. The Department of Labor has developed Optional Form WH-384 to assist employees in obtaining a certification that meets these requirements.

E. Conclusion

While military deployments and the related strain placed on military families are not new to Americans or their employers, the “Active Duty Family Leave” for a “qualifying exigency” is new to the FMLA. Though well-intentioned in providing a safety net for military families, because the “qualifying exigencies” are non-medical in nature and similar to routine activities of non-military families, there is potential for abuse of this benefit if not understood and appropriately monitored by employers. In particular, because this leave provision constitutes un-chartered territory for the courts, you should contact an attorney to assist you in navigating the “Active Duty Family Leave” benefits and requirements.

“Qualifying exigencies” are not the only addition to the FMLA affecting military families and their employers. Stay tuned for the second installment of this article, addressing the “Injured Service Member Leave” and the potential pitfalls that await employers.

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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