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NEW FMLA AMENDMENTS CREATE "EXIGENCIES" FOR EMPLOYERS

*(**Editor's Note:** This is the second 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. Click here to read part one.)*

This two-part article analyzes the new military family leave provisions of the Family and Medical Leave Act ("FMLA"), as amended in 2008 and again in 2009. The first installment explored the "Active Duty Family Leave" for employees who experience a "qualifying exigency" arising out of the fact that a family member has been called to active duty. This second installment analyzes the leave available for an employee to care for a military family member who is injured in the line of duty and, specifically, how this "Injured Service Member Leave" compares with the traditional FMLA leave to care for a family member with a serious health condition.

Injured Service Member Leave

In October 2009, approximately four times as many U.S. troops were injured in Afghanistan as in October 2008. The increase in troop injuries will most certainly continue with the addition of 30,000 troops to be deployed to Afghanistan in the coming months. Also increasing is the eligibility for certain employees to take leave under the FMLA to care for injured military service members.

On January 28, 2008, the FMLA was amended to create a new type of leave for employees: leave to care for a military member injured in the line of duty. This "Injured Service Member Leave" is available for up to 26 weeks in a single 12-month period (which can be greater than the 12-month period for other types of FMLA leave). On October 28, 2009, the "Injured Service Member Leave" was expanded to cover certain veterans injured in the line of duty, and to include pre-existing injuries or conditions that are aggravated in the line of duty. Because the "Injured Service Member Leave" creates a second 12-month period and provides for more than twice the number of weeks of leave, it is unique from the other types of leave and may present numerous pitfalls for employers.

A. Which employees are eligible for "Injured Service Member Leave?"

Under the "Injured Service Member Leave" provisions, eligible employees include the spouse, son, daughter, parent, or next of kin of a "covered service member." Additional family members may qualify as next of kin in the following order of priority: legal custodians, siblings, grandparents, aunts and uncles, and, finally, first cousins. However, the service member may designate in writing any blood relative as his next of kin, which takes precedence over the above pecking order.

In order to determine if an employee is eligible for this leave, employers must understand which military members are covered. As originally enacted in 2008, a covered service member included only current members of the Armed Forces, National Guard, or Reserves, undergoing medical treatment, recuperation, or therapy at a military medical facility for a serious injury or illness. The "Injured Service Member Leave" did not cover former

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service members until amended in October 2009. Under the 2009 Amendments, covered service members now include veterans who were active members of the military any time within five years prior to the date he undergoes the medical treatment for which the employee requests leave. Thus, so long as the veteran receives therapy for a serious injury or illness within five years of his discharge (not necessarily within five years of his injury), an eligible employee may take leave to care for him.

Of course, the service member must have a "serious injury or illness," which include injuries or illnesses incurred in the line of duty that render the service member medically unfit to perform the duties of his office, grade, rank, or rating. The 2009 Amendments expanded this definition so that a "serious injury or illness" now also includes an aggravation—by service in the line of active duty—of a pre-existing injury or illness.

B. How is a "single 12-month period" calculated?

"Injured Service Member Leave" covers 26 weeks of leave for an eligible employee in a "single" 12-month period. This leave category is separate from the 12 weeks of covered leave in "any" 12-month period for the birth of a newborn/adoption of a child, to care for a family member with a serious health condition, because of the employee's own health condition or because of a qualifying exigency, discussed in the first installment of this article. The differences are not limited to the length of leave, but how the 12-month periods are calculated and interact, particularly when the different 12-month periods overlap.

There are multiple options for calculating "any" 12-month period, which are familiar to employers and apply to the original FMLA leave categories as well as the new qualifying exigency leave. "Any" 12-month period can be based on a calendar year, the employer's fiscal year, the employee's anniversary date, date of the employee's first FMLA leave, or a rolling 12-month period. However, the "single" 12-month period for "Injured Service Member Leave" must be measured only from the date the employee first takes FMLA leave to care for the covered service member, regardless of how the employer otherwise calculates its "any" 12-month period for other types of FMLA leave.

Although the FMLA now has, effectively, two separate 12-month periods, they can overlap. When they do, an employee who takes "Injured Service Member Leave" is limited to 26 weeks of leave for any purpose, including up to the maximum 12 weeks of leave for other FMLA purposes. Some examples are as follows:

1. The employer calculates "any" 12-month period based on the employee's anniversary date, which is April 1. Starting in May 2009, the employee takes 12 weeks of leave in connection with the birth of her child. The employee returns to work in August 2009 after the 12 weeks have been exhausted. However, starting September 15, 2009, the employee takes "Injured Service Member Leave" to care for her husband, who suffered a serious injury in the line of duty. The employee takes the full 26 weeks of leave, returning to work in March 2010. If she had not taken the "Injured Service Member Leave," the "any" 12-month period applicable to her traditional, 12-week FMLA leave would have re-set on April 1, 2010, her anniversary date. However, because the employee took 26 weeks of leave between September 15, 2009, and March 2010, the

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employee would not be entitled to take FMLA leave—for any purpose—until September 15, 2010, when the "single" 12-month period applicable to "Injured Service Member Leave" expires.

2. Starting on July 15, 2009, an employee takes 18 weeks of "Injured Service Member Leave" to care for her son who was injured in the line of duty. One month after she returns to work, she requests leave to care for her husband, who has suffered a serious health condition. Regardless of how the employer calculates the "any" 12-month period for regular FMLA leave, the employee would be eligible for up to only eight (8) weeks of leave to care for her husband, because she cannot exceed a total of 26 weeks of leave for any reason in the "single" 12-month period applicable to her "Injured Service Member Leave." Conversely, if the employee only took 10 weeks of "Injured Service Member Leave," she would only be eligible for up to the maximum 12 weeks of leave to care for her husband (not 16).

3. The employer uses the calendar year method to calculate "any" 12-month period for regular FMLA leave. An employee takes five weeks of FMLA leave to care for a newborn child starting in February 2009. The employee then takes "Injured Service Member Leave" starting on June 1, 2009, for 10 weeks. The employee then takes seven weeks of leave in the remainder of 2009 to care for her own serious health condition. As of the end of calendar year 2009, the employee has used all of her 12 weeks of traditional FMLA leave, including seven weeks that occurred during the "single" 12-month period beginning in June 2009. Although "any" 12-month period resets on January 1, 2010, because she is still in her "single" 12-month period (which runs from June 2009–June 2010) during which she has taken a total of 17 of 26 available weeks of leave, she is limited to taking only nine weeks of leave for any purpose between January 1 and June 1, 2010, when her "single" 12-month period expires.

4. The "Injured Service Member Leave" is available on a per-covered servicemember, per-injury basis. Thus, if an employee has two sons who suffer a serious injury or illness in the line of duty, she may be eligible for 26 weeks of leave in a "single" 12-month period for each injury. However, to the extent the 12-month periods overlap, the employee is limited to 26 weeks in a "single" 12-month period.

C. Designation of Leave

Leave to care for an injured service member can look a lot like leave to care for a family member with a serious health condition. In the event the leave may qualify as either "Injured Service Member Leave" or as serious health condition leave, the employer must designate it as "Injured Service Member Leave" in the first instance, and provide notice to the employee of his or her eligibility for this type of leave. As with leave taken for other qualifying reasons, employers may retroactively designate leave as leave to care for an injured service member.

D. Certification Requirements

An employer may require an employee to provide certification completed by an authorized health care provider of the injured service member. The health care provider must be affiliated with the United States' Departments of

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Defense or Veterans Affairs. The employer may require that the certification include information regarding the covered service member's injury, including that it occurred in the line of duty and renders him medically unfit to perform the duties of his office, grade, rank, or rating; the date of the injury and its probable duration; information to establish the covered service member is in need of care; an estimate of the anticipated length of recovery; and whether periodic care is necessary. The employer may also require the employee to provide information about his or her relationship to the injured service member, and the covered service member's military branch, rank, and current duty assignment. In a departure from certification to care for a serious health condition, second and third opinions are not permitted in connection with Injured Service Member Leave.

The Department of Labor has developed Optional Form WH-385 to assist employees in obtaining certification that meets the FMLA's certification requirements related to Injured Service Member Leave. Additionally, the employer must accept as sufficient certification "invitational travel orders" or "invitational travel authorizations" issued to any family member to join an injured or ill service member at his bedside.

E. Conclusion

With the expansion of military operations in the Middle East and the continuation of operations around the globe, it is not only important to understand who is eligible for "Injured Service Member Leave," but also how that leave interacts with other qualifying leaves under the FMLA. The separate "single" 12-month period in which the employees can take up to 26 weeks of leave to care for an injured service member must be measured and monitored carefully, particularly when the employee seeks to take FMLA leave for another qualifying reason, such as the birth of a child.

—*Jennifer L. Englander*

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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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