

New Federal FMLA Rules: Leave for a "Qualifying Exigency" vs. Leave to Care for a "Covered Servicemember"

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The new Federal FMLA Rules and accompanying commentary are comprehensive and complex. Employers are encouraged to contact counsel before changing procedures or taking any actions to comply with the new Rules.

An example of the complicated nature of the new Rules can be found in the distinction in the eligibility criteria for FMLA military caregiver leave relating to a "qualifying exigency" versus leave to care for a "covered servicemember." Under the new FMLA rules, "qualifying exigency" leave must be granted to any spouse, son, daughter or parent of an individual on "active duty or call to active duty." However, *only those individuals called up from the National Guard, the Reserve forces, the Coast Guard, or those called back to military duty from retired status* qualify as being on "active duty" or "call to active duty" under the new Rules. Employees whose family members are serving actively in the Regular Armed Forces are *not* eligible to take leave because of a "qualifying exigency."

By contrast, under the new FMLA Rules family members seeking family medical leave to care for an injured servicemember (maximum entitlement of up to 26 weeks) are entitled to such leave *regardless* of whether the family member for whom the employee is providing care serves in the Regular Armed Forces, or is a member of the National Guard or Reserves.

Once employers have sorted through who is eligible to take "qualifying exigency" leave under the FMLA, employers will need to figure out exactly what constitutes a "qualifying exigency." There are many events that trigger the right to such leave, and, even with the new FMLA Rules as guidance, determining what events constitute a "qualifying exigency" will continue to be difficult.

Finally, employers also need to consider whether there is any state law that would provide leave in cases where the Federal law does not. For example, the Maine Family Military Leave Act provides leave for family members of servicemembers who are about to be deployed, are on leave from a deployment, or have recently returned from a deployment. This provision of Maine law appears to apply to both members of the regular armed forces *and* reserve servicemembers.

We expect to issue further alerts as other tough issues under the new rules come to light, and as employers put the new Rules into practice.

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