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Dear Human Resource Professionals, Managers, and Employees:

AMENDMENTS TO THE FAMILY AND MEDICAL LEAVE ACT

This newsletter seeks to present as succinctly and directly as possible the basic provisions of the two new reasons for FMLA leave as contained in the recent amendments to the FMLA. The goal is to make these basic provisions of these two new reasons readily understood.

SERVICEMEMBER LEAVE

Servicemember leave is available to an employee to be away from the workplace under certain conditions in order to be at the side of a family member. The same basic employee eligibility requirements of having actually worked 1250 hours in the last twelve months and twelve months on the payroll still apply. The twelve months on the payroll are not required to be consecutive, and we have always considered the twelve months to have occurred within a reasonable span of time.

A **“servicemember”** is a person who:

- is currently a member of the military, including National Guard and Reserves, or who is on the temporary disability retired list, and who,
- has a condition that was incurred in the line of duty while on active duty which prevents the performance of his or her military duties, and who,
- is receiving treatment or therapy for that condition as an outpatient.

The **persons who are entitled to this leave** are those who meet the above basic requirements of work and time and who are the parent, spouse, child, or next of kin of the servicemember. The concept of “loco parentis” applies to servicemember leave as it has with other forms of FMLA

leave. As applied to servicemember leave, a person is “loco parentis” if day-to-day responsibility for care and financial support existed in the past for a significant period of time.

“**Next of kin**” must be a blood relative. It can be a blood relative designated in writing by the servicemember. If there is no designation, next of kin in descending order are the blood relative with legal custody, siblings, grandparents, aunts, uncles, and first cousins. Any and all are entitled to leave, whether taken simultaneously or not. Unlike parents employed by the same employer, there is no requirement for sharing leave. If there is a designation, no other person shall be considered next of kin for purposes of servicemember leave. “Reasonable documentation or statement” of family relationship can be required by the employer.

Certifications that can be required of the employee:

An invitational travel order (ITO) or invitational travel authorization (ITA) issued to “any family member” to go to a servicemember’s location prevents inquiry about medical necessity by the employer, whether the employee who is eligible is named or not in the ITO or ITA. If not named, the reasonable documentation or statement mentioned above can be required to prove family relationship. The basic eligibility for FMLA leave is still required. During the ITO/ITA period, the employee can be absent intermittently or continuously at the employee’s option. An ITO/ITA is issued by a unit commander and authorizes cost of travel and lodging, as well as a per diem.

Absent an ITO or an ITA and upon the request of the employer, it is the responsibility of the employee to present information which shows the medical necessity of the need to be absent in order to care for the servicemember. The information must be from both a health care provider and the employee. For servicemember leave only, a **health care provider** must be either a DOD or VA health care provider, or either a health care provider authorized as network or non-network by TRICARE. TRICARE is the insurance carrier for those in military service.

The information that may be requested of the employee and the health care provider is contained on a form issued by the Department of Labor. That form is **WH 385** and it is attached below. Form WH 385 is not an ITO or ITA, but an ITO or ITA is required to be based solely on the medical determination of Part B of Section II of WH 385. Presumably, one will follow the other. An employer can make inquiries of the health care provider, if desired, but only to obtain “clarification and authentication.” This is allowed only if part of the information on the form is missing or is vague. The employee must first be given the opportunity to obtain the information. Contact with the health care provider made on behalf of the employer can be done only by a health care provider (as the term is broadly defined), an HR professional, a leave administrator, or a management official. This list of allowable contact persons applies to all forms of FMLA leave and is an expansion from the initial limitation to a health care provider. Further, “under no circumstances” may the employee’s direct supervisor contact the health care provider.

Unlike other forms of FMLA leave, the option of obtaining a second opinion on the need for servicemember leave is not available. FMLA leave can be denied if the necessary information is not provided within fifteen days of the employer's written request for such information absent extenuating circumstances.

Amount of Leave:

The direct and short answer is up to 26 workweeks in a twelve month "servicemember year" that starts with the first usage of servicemember leave. This servicemember year is different than the "FMLA year" we are used to that starts with first usage of FMLA for any other reason. During this servicemember year the employee is entitled to no more than 26 weeks for FMLA usage for all reasons. For example, if the employee used 20 weeks of servicemember leave within the first eight months of the servicemember year, the most the employee would be entitled to during the next four months for the birth of a child, for example, would be six weeks. At the end of those four months, which would be the end of the servicemember year, the employee would be entitled to six more weeks for the birth of the child up until the child was one year old.

While the servicemember leave does not re-new after the servicemember year has run, if the same servicemember suffers another condition caused by active duty, the same employee might be eligible for another 26 weeks during another servicemember year. Also, should another servicemember suffer such a condition, the same employee might be entitled to 26 weeks during a different servicemember year. If there is an overlap, the employee is entitled to no more than 26 weeks total during a twelve month period.

As with other FMLA leave, spouses, but only spouses, working for the same employer, i.e. the state, may be required by the employer to share the leave entitlement. Other persons who are eligible and who work for the same employer cannot be required to share servicemember leave.

QUALIFYING EXIGENCY LEAVE

An employee is entitled to qualifying exigency leave to be away from the work place under certain conditions when a family member is on active duty or on call to active duty. Again, the same basic qualifying requirements of 1250 hours of work and twelve months of employment must be met by the employee.

A **qualifying exigency** exists when the employee's spouse, son, daughter, or parent—the "military member"— is in one of two statuses. The concept of loco parentis applies here just as above. The first status is that of actually being on **active duty**. The second status is that of being on **call to active duty**. This latter status exists when the person has received either formal orders for active duty or has received "notification" of impending orders to active duty. Importantly, a

qualifying exigency for FMLA leave purposes does not exist where the person is in the full-time regular military, but applies only to Reservists and National Guard members who have been called, or who are about to be called. As I read the regulations, it appears to me that a military member serving full-time in the Reserves or National Guard, as, for example, serving as full-time cadre at the Armory, would be within the group for which a qualifying exigency could exist. It is only those who are on active duty with a regular military unit for whom a qualifying exigency would not exist for FMLA leave purposes.

The call or impending call must be in support of a **contingency operation**. A contingency operation is one in which either members of the armed forces (not just the military member) may become involved in military action against an enemy or during a national emergency declared by the President. A contingency operation is not weekend drill or summer camp, but, otherwise, appears pretty broad. The call or impending call is that made by Federal authority, not state authority.

Amount of Leave:

Except as indicated below, the maximum leave is twelve workweeks during a FMLA year for any and all reasons, except for servicemember leave, which has a separate year as indicated above. This is the familiar FMLA year of old. Different from the past is that leave for a qualifying exigency is added to the list of reasons. It is still a total of twelve workweeks for the list of reasons in a FMLA year, except for servicemember leave. The qualifying exigency leave entitlement renews at the end of a FMLA year.

Certification:

The formal orders, of course, constitute certification, and, also, “documentation issued” that indicates an impending call can constitute certification. What this latter encompasses is left to our best judgment, but it is the responsibility of the employee to provide that which will enable us to reasonably conclude that a qualifying exigency exists. Other information can be requested of the employee, and such information is contained on **Form WH 384**, which is attached.

The verification ability is limited. Where meeting with a third party is involved, we can contact the third party to verify the meeting, but nothing else. The other permitted verification is contact the military unit to verify the active duty or the issuance of the orders or the notification.

Circumstances for which leave may be taken:

The need for the leave for these circumstances must be necessitated by the active duty status of the military member or the call to active duty status of the military member. Further, the descriptions of the circumstances are general. Consequently, we are going to be called upon to exercise our good sense and judgment in deciding whether to recognize that one of these circumstances exists.

Short notice

When the military member has received either orders or notification of impending orders seven days or less from the date of deployment. The amount of leave under this category is limited to seven days beginning the receipt of either orders or notification.

Military events and related activities

To attend official ceremonies or programs, and to attend family support programs sponsored or promoted by the military, military service organizations, or the Red Cross.

Childcare and school activities:

To arrange for alternative childcare or attendance at different school, to attend meetings with school or childcare staff, or, on an urgent basis, to actually provide childcare for the child of the military member. This latter is stressed in the regulations as only applying to urgent needs, and not to on-going needs. No FMLA leave is available for on-going childcare.

Financial and legal arrangements:

To make or update financial or legal arrangements, or to pursue military service benefits.

Counseling:

To attend counseling that is provided by someone other than a healthcare provider for oneself, for the military member, or for the child, foster child, or legal ward of the military member.

Rest and Recuperation (R&R):

Up to five days of leave is available to eligible employees to spend with a military member who is on R&R from a deployment.

Post-deployment activities:

During a period of 90 days following the end of active duty, to attend an official ceremony or program. For a deceased military member, to meet the body and/or to make funeral arrangements. There is no time limit during which leave for this latter reason must be used.

Additional activities:

This covers “other events” which arise either out of active duty or the receipt of orders or notification. The employer and employee must agree both that these other events constitute a qualifying exigency and on the time and duration of the leave.

Conclusion:

I hope this is helpful. Please keep in mind that the above presents the basics of the two new reasons for FMLA leave. Until we get used to working with the new FMLA, please do not hesitate to call to discuss any issues. It will be helpful to us both.

The citation to the act is 29 USCA 2611, and following. The citation to the regulations is 29 CFR 525.100, and following

Sincerely,

s/Robert R. Boland, Jr.
General Counsel

L:RRB:mcc

Attachments:

[WH-385.pdf](#)

[WH-384.pdf](#)